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No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

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QUESTIONS PRESENTED

1. Whether the respondent was seized in violation of the Fourth Amendment at the time he was escorted to the state police barracks on April 16, 1977.

2. If the respondent was seized prior to his formal arrest on April 16, 1977, did that seizure occur at a point in time at which the police had probable cause to believe he had committed murder.

3. Assuming that the respondent was seized in violation of the Fourth Amendment and that that seizure tainted his confession and certain physical evidence, whether their admission at trial was harmless beyond a reasonable doubt in view of the defendant's ratification of his confession at trial and his defense of absence of mental capacity.

4. If the respondent's Fourth Amendment rights were violated, whether a good-faith exception to the exclusionary rule should be adopted and applied in this case.

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OPINIONS BELOW

The opinion of the Supreme Court of the State of Connecticut (App. C, *infra*, 4A-9A) in which it remanded the case to the trial court for further articulation of the factual basis of the trial court's decision on the defendant's motion to suppress is reported at 42 Conn. L.J., No. 51, p. 13) (1981). The opinion of the Supreme Court of the State of Connecticut to which this petition is addressed (App. E, *infra*, 15A-23A) is reported at 186 Conn. 287, 440 A.2d 984 (1982).

The original opinion of the trial court on the motion to suppress appears in a footnote of the first opinion of the Supreme Court of the State of Connecticut (App. C, *infra*, 6A). The opinion of the trial court after the remand for a further articulation of the factual basis of its decision on the motion to suppress is unreported and appears in the appendix (App. D, *infra*, 10A-14A).

JURISDICTION

The judgment of the Supreme Court of the State of Connecticut was rendered on February 23, 1982 (App. E, *infra*, 15A). On April 13, 1982, Justice Marshall extended the time within which to file a petition for a writ of certiorari to and including May 24, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides in pertinent part:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated***."

STATEMENT

During the night of April 11-12, 1977, nineteen-year-old Kim Steacy was brutally stabbed to death in the small Connecticut town of Canton. Five days later, the respondent confessed to the killing at the State Police Barracks in Litchfield and was arrested. Following his indictment for murder and a trial before a three-judge panel of the Superior Court,[1] he was found guilty as charged and sentenced to a term of imprisonment of not less then twenty-five years nor more than life. See Conn. Gen. Stat. §§ 53a-54a(c), 53a-35(b), (c). The defendant appealed his conviction to the Connecticut Supreme Court claiming, among other things, that he was seized in violation of the Fourth Amendment when he was escorted to the state police barracks five days after the killing and that that illegal seizure tainted the confession he later gave as well as certain physical evidence of guilt. The state supreme court agreed, reversed the trial court's finding to the contrary, and ordered a new trial.[2]

In the early morning hours of April 12, 1977, Donald Miller returned to the apartment that he shared

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[1]The respondent waived his right to be tried by a jury of twelve and elected instead to be tried by a three-judge panel of the Superior Court. *See* Conn. Gen. Stat. § 54-82(b), (c).

[2]Although the respondent based his claim before the Connecticut Supreme Court on both article first, section seven of the state constitution and the Fourth Amendment of the United States Constitution, the court clearly indicated the predicate for its holding when it stated:

> We conclude that the defendant was seized at the time he was taken to the Litchfield barracks and that the trial court erred in admitting the confession and physical evidence obtained as a result of the interrogation at the Litchfield barracks on the night in question, which interrogation violated the defendant's fourth amendment protection against unreasonable seizures.

App. E, *infra*, 19A.

with Kim Steacy and found her lying dead on the floor in a pool of blood. Police and medical personnel were summoned to the scene. An autopsy of the body conducted later that day by the state's chief medical examiner led him to conclude that the cause of her death was blunt force injury to the head, incised wounds of the neck and larynx, multiple stab wounds of the chest, abdomen, left lung, stomach, and spleen, and external and internal hemorrhage.

The living room, where the body was found, was in total disarray and blood spots were found near the body and in various portions of the kitchen, including the utensil drawer. Among the items of physical evidence found at the scene were pieces of a ceramic vase covered with blood and hair and various knives and parts of knives with blood on them, which were found in various locations in the kitchen and living room. A palm print in blood appeared on a portion of the kitchen counter that was later removed and introduced into evidence.

Officers investigating the apparent homicide also noticed a trail of blood leading from the victim's apartment to the parking lot adjacent to the building. Analysis of the blood found in the parking lot and driveway disclosed that it was type AB blood, which is found in about four percent of a typical population group. The victim's blood type was O and is found in approximately forty-six percent of a typical population group.

An officer noticed a white opaque substance located on the pubic hairs of the victim, who was clad only with a bathrobe. This substance was removed and later determined to be seminal fluid and spermatozoa.

In the course of the investigation, a Connecticut trooper interviewed friends of the victim. He learned from a married couple who had been with the victim in her apartment on the Friday (Good Friday) prior to her death that during the evening a man had knocked at her door and invited her and the others present to join them at a party across the hall. They declined. On Friday, four days after the homicide, this couple identified the

respondent, Ostroski, as that person through the use of a photograph. The officers also were informed that two neighbors of the respondent had complained to town officials that the respondent's dog could be heard barking in the respondent's apartment the Tuesday and Wednesday after the killing.

Efforts by the police to locate the respondent initially had proved unsuccessful. On Saturday, five days after the killing, however, the respondent, who had evidently just returned from New York, called the State Police Barracks at Litchfield around 6:00 p.m., saying that he had heard that Captain McDonnell was looking for him and wanted to speak with him. The desk officer did have a message stating that, "If Mr. Ostroski had stopped in at the Troop . . . Captain McDonnell wanted to talk to him," and asked the respondent where he was so that a meeting could be arranged. When the respondent, who was with his wife and child, answered that he was in a phone booth in New Milford, the desk officer attempted to give the respondent directions to the barracks, which were long and involved. He soon discovered that the respondent was not familiar with the area and so told him that he would send an officer to New Milford to meet him and either bring him to the barracks or lead him there.

At some point during this conversation the respondent said, with regard to the time of the meeting with McDonnell, "Well, how about tomorrow?" The desk officer stated that he thought the respondent should come in that night, and explained his reasoning at the hearing on the motion to suppress by saying that when a captain asks to see somebody, he considers the matter important.

The respondent was more than willing to have another officer meet him to direct or take him to the barracks, however. The respondent described his location, and the desk officer arranged for the New Milford police to meet the respondent and have him follow their cruiser to the New Milford Police Department.

A state trooper from the Litchfield barracks, without having been asked to do so by a superior officer, went to meet the respondent at the New Milford Police Department. After agreeing that it would be mutually convenient for the respondent to travel in the cruiser to the Litchfield barracks, the respondent got in the front seat of the cruiser and his wife and child got in the back seat. See App. A, *infra*, 1A.

The trooper, who had no specific knowledge of the Kim Steacy homicide and apparently was not involved in the investigation, did not ask the respondent any questions concerning the case during the approximately forty-minute ride to the barracks. After some small talk between the Ostroskis and the trooper, the respondent stated that Captain McDonnell wanted to speak with him regarding a "homicide" or "killing" of a girl in Canton. The trooper responded that he did not know. The respondent then stated that he had been working up north as a carpenter and that that was the reason why he had cuts on his hands.[3] On the trip, the respondent appeared pleasant and talkative to the trooper, although the trooper did notice him become a little nervous. The respondent's conduct was normal in the trooper's opinion and he appeared to be lucid.

When the trooper and the Ostroskis arrived at the barracks, the respondent followed the trooper from the car to the building voluntarily. He was at no time placed in handcuffs or otherwise coerced to comply with the request that he speak with Captain McDonnell at the Litchfield barracks. App. D, *infra*, 10A.

Once the respondent arrived at the barracks he was met by Captain McDonnell, who had come to the barracks after having been informed that the respondent was coming in to see him. The two were introduced and proceeded to a room on the second floor of the building

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[3]The respondent objected to the elicitation of this testimony at the hearing on his motion to suppress claiming that at the time he made these statements in the cruiser he had not yet been given his *Miranda* warnings. The trial court found the respondent was not then in custody and that, therefore, no *Miranda* violation had occurred. *See* App. A, *infra*, 1A.

with another officer. The respondent's wife and daughter waited for him on the first floor of the building. The conversation and questioning that took place thereafter was tape recorded and a transcript of that recording, which was admitted into evidence, was presented to the state supreme court in the respondent's appendix to his brief.

The respondent was informed by McDonnell that he wanted to talk to him about the crime that took place in Canton on the previous Monday, and that they were talking to everybody that had been in and around the apartment. When asked if he had been involved with the police before, the respondent answered: "Many times." McDonnell told him that he would read his rights to him "just so there's no misunderstanding." He also stated for the record the time (a quarter after eight) and the fact that they were at the State Police barracks in Litchfield, and not at a "hotel or anything like that."

As McDonnell proceeded to read to the respondent his *Miranda* rights, the respondent interrupted by saying, "I thought these rights were for people under arrest," to which McDonnell responded, "No, it's for anybody that we talk to. . . . I'm just making sure here that you know what your [sic] . . . . [k]now what your [sic] doing. You are not under arrest. . . ." Later, McDonnell again assured him: "So any question in your mind while I'm reading these rights to you now, so okay, your not under arrest, okay?". The respondent answered: "All right."

McDonnell then read to the respondent his *Miranda* rights, including his right to stop answering questions at any time and his right to discontinue the interview at any time. The respondent then read aloud and signed a statement indicating that he was making a statement freely and voluntarily with full knowledge of his rights.

The interview began by McDonnell asking the respondent: "Okay, what can you tell us about that apartment Ricky, or those people that live around there, can you tell us anything that would help us out?" The

respondent began by telling McDonnell of his friend Stanley who had an apartment across the hall from the victim's. When asked when was the last time he was at Stanley's apartment, the respondent first answered by saying around two weeks ago and then corrected himself by saying that he thought he may have been there the day before or two days before Easter (Good Friday).[4]

The respondent went on to tell McDonnell about the time he went to the apartment across the hall from Stanley to ask the people there if they wanted to join Stanley and him for a few drinks. When asked by McDonnell when that happened, the respondent answered that he thought that that was one of the first few times he went up to Stanley's apartment and did not identify the incident as having occurred only eight days earlier.

The respondent then spoke of his trip "up north," to New York and Vermont and described it as an unsuccessful job-hunting trip. He went on to refer to "blisters all over my hands," and said that he was "always recking [his] fingers working with a carpenter," that he would "[c]ut [his] hands all to hell trying to cut" sheet rock or tar paper and that he had also cut his hands in the process of cutting shingles used for siding a home. He said that he had been working with these materials "about a week and a half, two weeks ago." When McDonnell asked to see his hand that was cut, McDonnell said that he saw only one cut. The respondent agreed that that one cut was the worst and that it had happened while he was cutting tar paper with a razor.

After some further questioning, McDonnell asked for, and was given, a sample of the respondent's hair. He also asked the respondent if he knew what his blood type was, and the respondent answered by saying that he thought it was AB negative. The respondent agreed

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[4]During the course of the questioning the respondent indicated that he had earlier attended college.

to sign a statement authorizing the police to get a record of his blood type from his doctor.

He was then asked about his recent travels, and said that he and his wife and daughter left on Tuesday morning (the morning after the homicide) at about 8 or 9 o'clock. They traveled to upstate New York, stayed overnight and then returned to Connecticut on Wednesday because they remembered that they had left the dog unattended. He stated that on Thursday afternoon after his wife picked up her unemployment check, they went to New York, to Vermont, back through New York and "were just travelling all over the place, going in circles." They returned to Connecticut on Saturday and, that same day, after the respondent called his mother and learned that McDonnell wanted to speak with him, called the Litchfield barracks.

The respondent was asked if he would mind letting the police search his car. After being assured that he could keep an eye on the troopers while they conducted the search and that he need not worry about the presence of any small quantity of drugs, he signed a consent form and said he had "no problem" about doing so.

The discussion turned to the respondent's travels during the week, the respondent's recollection of which was vague. The respondent told McDonnell that he had to buy new clothes, a new shirt and new pants, because "I forgot to bring clothes with us." He also said that when they left they had forgotten about the dog. In the course of the questioning, the respondent was asked if he minded taking off his shirt and pants; he stated that he did not and proceeded to let the officers examine his upper torso and legs. The respondent also permitted the officers to examine his shoes.

At one point, the respondent asked to talk to his wife. McDonnell, who had asked Sergeant Cudworth, the other officer present, to leave the room to get some search consent forms, agreed to the request but asked the respondent to wait until the other officer would return. When the respondent went on to tell McDonnell

that he wanted to speak with his wife so that she could provide McDonnell with some details about their trip up north, McDonnell, without denying the request, responded by saying that those details were not important.

After the respondent signed two consent forms, one permitting the police to ask his doctor regarding the respondent's blood type and the other permitting the police to search his car, he said, "I'd really like to get going as soon as possible, I'm beat. . . ."[5]

McDonnell then attempted to wrap up the interview and pointed to the rather suspicious fact that the respondent had left the state the morning after the night the victim was killed. The respondent acknowledged the cause for suspicion and continued to explain the motivation for his trip up north. When McDonnell asked the respondent about what he did on Monday (the day of the killing), he said that he got home at 8:00 or 9:00 p.m., ate a sandwich, watched a little television and went to bed before ten p.m. When he was asked what television programs he watched, he said he could not remember, and then said he was not sure he did watch television. When he was asked if, when he arrived home on Monday night, his wife had told him that his friend Stanley was looking for him, he first said he didn't remember, and later said that it was

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[5]The following exchange then took place:

SERGEANT CUDWORTH: Okay, doing a lot of driving heavy?

[RESPONDENT]: Oh yea, driving and. . . .

SERGEANT CUDWORTH: Did you do all the driving or did the wife do some?

[RESPONDENT]: Well she did some but I did most of it, I'm, I'm really beat, I'm so damn tired I, I could fall asleep on my feet, get to a motel and just go to sleep.

CAPTAIN McDONNELL: Why don't you go home, sleep in your own house.

[RESPONDENT]: I'm tired of driving.

possible. The respondent said that he had gone to Southington before going home and started drinking and that he was not sober when he came home that night. The respondent then said: "I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob . . . liable to start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good." No direct response to what the respondent said was given.

The conversation continued, and the respondent agreed to permit an officer to photograph his hand. When the respondent then asked if he could "at least get on the road pretty soon?" McDonnell responded by saying that he shouldn't worry about driving, because "[w]e'll drive you where-ever [sic] you end up wanting to go." The following exchange ensued:

> [RESPONDENT]: I want to go back to my car and then from there I'm gonna go, I'll go home, I'll go home, crimidy sakes, cuz I'm so tired. So, what do you think?
>
> CAPTAIN McDONNELL: I think you killed this girl Ricky.
>
> [RESPONDENT]: You think I killed her?
>
> CAPTAIN McDONNELL: Yeah, you asked me what I think, right, want me to be honest with you or you want me to lie to ya?
>
> [RESPONDENT]: I never killed nobody in my life, I couldn't.
>
> CAPTAIN McDONNELL: That's what I think.
>
> [RESPONDENT]: Jesus Christ.

They then talked about the possibility that the respondent committed the crime. McDonnell asked again about the respondent's cut on his hand, and asked the respondent if they would find blood in his car. The respondent said they wouldn't, and then posed this

question: "Do you actually think I honestly did this?" Captain McDonnell: "I think you probably did, probably did, you got a cut hand. . . ." Respondent: "Lord I hope not." After further questioning McDonnell reminded the respondent of the significance of the cut on his hand. He challenged the respondent's assertion that the cut had been there a couple of weeks and again asked the respondent what his blood type was. And when the respondent said "AB," McDonnell told him that AB blood was found at the scene, and that it is one of the rarest types of blood.

When the respondent asked for time to think, Sergeant Cudworth asked him if he wanted to talk with his wife. He said that he did, and McDonnell went downstairs to get her. After some exchange in which the respondent continued to question whether he could have killed the victim, his wife entered the room and they both talked privately.

Afterward, the respondent stated that he didn't remember anything, "I was tripping my fuckin brains out. . . ." After some questioning of the respondent's wife, McDonnell asked the respondent why he really went out of state on Tuesday. He answered by saying that he was scared, that he had blood on his hands. He said that there was too much blood, that he cleaned his clothes, that he threw his shirt in the Collinsville dump. McDonnell then asked how it happened and the respondent described in detail the killing and the events that followed.

The respondent was formally arrested for murder by Sergeant Cudworth, who then read his rights to him again, although the respondent said he would waive them. He was questioned further and then was asked if he wanted an attorney. When he said he didn't know one, Captain McDonnell offered to help him find one, but the respondent declined the offer. McDonnell then asked the respondent: "Got any complaints, or comments or anything Rick on the way that we, we've treated you or talked to you or anything, cuz if you do,

say so." He answered simply, "No." McDonnell again advised the respondent to get a lawyer.

A photograph was taken again of the respondent's hand and fingernail scrapings were taken. After some further questions, McDonnell encouraged the respondent to call his parents and an attorney. Finally, McDonnell convinced the respondent to get a lawyer and McDonnell went downstairs and to call a public defender. The respondent answered some additional questions and then asked that any further questioning be done the following day. When McDonnell asked if he could take a short written statement, the respondent said that he wanted to speak with a lawyer first and the questioning immediately ceased.

At the trial that followed his indictment for murder, the respondent moved to suppress the confession and the physical evidence seized as the result of the consents obtained from him during questioning at the barracks on the ground that his Fifth Amendment rights had been violated when he was questioned after he had asserted his right to remain silent. App. C, *infra*, 6A.

The trial court denied the motion, concluding that there was some question with respect to whether the respondent had unequivocally asked that the interrogation cease, that the rule of *Miranda* was not violated, and that the confession was "voluntarily, knowingly and intelligently made." *Id.*, 6A n.2. Although the respondent took exception to this ruling, he elected to take the stand at his trial and to ratify his confession and present to the court a defense of absence of mental capacity, which included the testimony of two psychiatrists.[6] That the respondent testified at trial voluntarily

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[6]Prior to trial the respondent filed with the court pursuant to Conn. Prac. Bk. § 2170 (now § 759), a notice indicating his intention to introduce at trial expert testimony bearing upon the issue of whether he had the mental state required for the offense charged. *See* Conn. Gen. Stat. §§ 53a-7, 53a-54a.

and knowingly is demonstrated by the preliminary inquiry on those issues conducted by both defense counsel and the court. *See* App. B, *infra*, 2A-3A.

On appeal, the Supreme Court concluded that, because the trial court had not clearly indicated whether the respondent was in custody at the time he was questioned, a remand of the case for further articulation of the trial court's decision was necessary. App. C, *infra*, 7A. In doing so, it indicated that for the first time on appeal the respondent had claimed that he was seized without probable cause at the time he was picked up at New Milford by a state trooper or, at least, when he entered the Litchfield barracks.[7] *Ibid.* The supreme court, noting that *Dunaway v. New York*, 442 U.S. 200 (1979) had been decided after the respondent's trial, directed the trial court to address this claim as well on the remand. *Ibid.*

On the remand, the trial court rendered a five page opinion in which it found that the respondent's freedom of action was not restricted in any significant way; he came voluntarily to the barracks; he was immediately and later informed that he was not under arrest; he was not subjected to threats or hints of threats; he was given, and repeated, his *Miranda* rights; he confessed in the presence of his wife; and that, while he may have been in a coercive environment, he had not been seized prior to his formal arrest and was not in custody for *Miranda* purposes until his formal arrest. App. D, *infra*, 10A-14A. In making this finding, the trial court stressed the significance that listening to the tape recording of the interview had on their decision. *Id.*, 13A.

The state supreme court, on final review, concluded that the respondent had been seized at the time he was

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[7]Actually, as the statement above discloses, *supra*, 5, the respondent did raise at trial the claim that he was in custody when he was picked up by a state trooper in New Milford. Yet the claim was then custody for *Miranda* purposes and not seizure for Fourth Amendment purposes.

"taken to the Litchfield barracks"; that the trial court's finding to the contrary was "clearly erroneous"; and that the respondent's confession and the physical evidence obtained as a result of the interrogation had been erroneously admitted at trial. App. E, *infra*, 19A. Although the state had urged in its brief that any error that may have occurred in the admission of this evidence was harmless beyond a reasonable doubt in light of the respondent's trial confession and defense (App. F, *infra*, 24A), the state supreme court failed to consider this claim and, instead, set aside the judgment, ordering a new trial. App. E, *infra*, 23A.

REASONS FOR GRANTING THE PETITION

1. The Connecticut Supreme Court's conclusion that the respondent was seized at the time he was taken to the Litchfield barracks is clearly at variance with the decisions of this Court.

This case presents important questions concerning the scope of the Fourth Amendment's proscription against unreasonable seizures and the applicability of the remedy devised for its violation. The Fourth Amendment's simple prohibition of unreasonable seizures encompasses seizures of the person. *Payton v. New York*, 445 U.S. 573, 585 (1980); *Cupp v. Murphy*, 412 U.S. 291, 294 (1973); *Terry v. Ohio*, 392 U.S. 1, 16 (1968). And it is now clear that a person may be seized in terms of the Fourth Amendment notwithstanding that no formal arrest or "booking" has occurred. *Dunaway v. New York*, 442 U.S. 200, 207, 216 (1979); *Terry v. Ohio*, *supra*, 16. The question for Fourth Amendment analysis is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (Stewart, J. joined by Rehnquist, J.). The test, which is an objective one, takes into consideration all of

those facts that, to an ordinary person, would convey the albeit unspoken message that his liberty of movement was being significantly restricted. *See United States v. Viegas*, 639 F.2d 42, 44 (1st Cir. 1981); 3 W. LaFave, Search and Seizure, A Treatise on the Fourth Amendment, 52-54 (1978). Thus, a seizure may occur notwithstanding the absence of an attempt to leave or the execution of a formal arrest where the person is subjected to "the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officers' request might be compelled." *Ibid.; see United States v. Tara*, 638 F.2d 892, 896 (5th Cir. 1981). Where, however, a citizen retains his freedom of choice and willingly cooperates with an officer's investigation, whether the investigative encounter takes place on the street or at the station house, no seizure has occurred. *United States v. Mendenhall, supra*, 554; *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977) (station house interrogation presenting issue of custody under *Miranda*); *Terry v. Ohio, supra*, 19 n.16; *Sibron v. New York*, 392 U.S. 40, 63 (1968). "Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." *Terry v. Ohio, supra*, 19 n.16, *see United States v. Mendenhall, supra*, 553.

Thus, in *Dunaway v. New York, supra*, 212, where the petitioner was "picked up," placed in a police cruiser and brought to a police station for questioning, was never told that he was not under arrest or that he was free to go, and, in fact, would have been restrained if he had attempted to leave, a seizure under the Fourth Amendment existed. *See United States v. Preston*, 608 F.2d 626, 631 (5th Cir. 1979). In *Oregon v. Mathiason, supra*, on the other hand, a suspect was found not to be in custody for *Miranda* purposes although he was interrogated in a police station about his involvement in

a crime. The suspect in *Mathiason* responded to a note left by an officer, in which he said that he wanted to discuss something with him by calling him the next day. *Id.*, 712. When the suspect expressed no preference as to a convenient place to meet, the officer asked if the suspect could meet him at the state patrol office, and the suspect agreed. *Ibid.* The suspect shook hands with the officer and was brought to an office, where he was told he was not under arrest. *Ibid.* He was questioned for a few minutes, was falsely told that the police had found his fingerprints at the scene, and shortly thereafter confessed to the crime. *Ibid.* The officer taped a confession and decided not to arrest the suspect at that time. *Ibid.* This Court concluded that, on the basis of those facts, the defendant was not in custody or deprived of his freedom of action in any significant way, even though the questioning may have taken place in a "coercive environment." *Id.*, 495.

The case before this Court is clearly distinguishable from *Dunaway* and more akin to *Mathiason*. Here, the respondent voluntarily initiated contact with the police by responding to a message left for him. There was no implication that he was being "picked up" against his will, inasmuch as the evidence indicated and the trial court found that a cruiser was sent for him only after it became apparent to him and the desk officer that he would have had difficulty following the rather complicated directions to the barracks. App. A, *infra*, 1A; App. D, *infra*, 10A. His riding together with the trooper rather than following in his own car was a matter only of mutual convenience and not the product of coercion. *Ibid.* The respondent's question about the possibility of meeting with Captain McDonnell the following day and the unfavorable answer given by an officer not involved in the investigation of the case surely did not convert the meeting that took place that night into an involuntary seizure of the respondent. No policeman threatened the respondent or used any show of force or coercive authority during the encounter, *see*

United States v. Robinson, 625 F.2d 1211, 1218 (5th Cir. 1980); no officer touched the respondent or his wife or child in any offensive or assertive manner. During the ride to the barracks, the respondent, who was accompanied by his wife and child, appeared to the trooper to be pleasant and talkative. *See Sibron v. New York*, *supra*, 63. No language of compulsion was used by the troopers. In fact, when at the barracks the respondent interrupted McDonnell as he attempted to read to him his *Miranda* rights by saying that he thought that *Miranda* rights were read only to people under arrest, he was assured that the reading was routine and that he was not under arrest. *See United States v. Lara*, 638 F.2d 892, 898 (5th Cir. 1981). He was later again expresaly informed that he was not under arrest. The respondent, who had been involved with the police by his own admission "many times," was cooperative, articulate, and had at least a partial college education.[8] *Cf. United States v. Mendenhall*, *supra*, 558.

Some of the factors considered by the state supreme court to have been dispositive of the issue were characterizations of selected facts at variance with the findings of the trial court, which heard witnesses and listened to the recording of the confession.[9] One was

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[8]Of course, when a trial court denies a motion to suppress, all of the evidence presented to it must be viewed in the light most favorable to the government. *See United States v. Huberts*, 637 F.2d 630, 635 (9th Cir. 1980); *United States v. Troutman*, 590 F.2d 604, 606 (5th Cir. 1979); *see also State v. Derrico*, 181 Conn. 151, 161, 434 A.2d 356 (1980).

[9]The statement that the respondent "was separated from [his] car and taken in a police car to the police barracks," (App. E, *infra*, 22A) obscures the real issue, and that is whether he accompanied the trooper voluntarily.

Nor was the respondent "summoned now" to the barracks, as the court stated. *Ibid.* He responded to a message left for him, and never pursued his request to schedule the meeting for the following day, a request that would not have been unreasonable under the circumstances.

taken out of context.[10] Some appear to be entirely irrelevant.[11] More important, many factors considered by the court involved incidents that occurred after the respondent was at the barracks for some time and did not directly bear upon the issue of the respondent's seizure. While events taking place after an initial encounter between the police and a suspect may shed light on the nature of the entire encounter, the state contends that the facts here do not justify that analysis. That is so because the record provides sufficient

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[10]The court included as one of the relevant factors in its decision the fact that Captain McDonnell informed the respondent that he was at the state police barracks and "not a hotel or anything like that." *See* App. E, *infra*, 20A-21A. The implicit suggestion of the court was that the captain was trying to inform the respondent that, unlike the situation in a hotel, where one can check in and out at will, he was in a state police barracks. The actual location of this statement in the transcript, coming as it does early in the interview and only a few lines before Captain McDonnell assured the respondent that he was not under arrest, *supra*, 9, appears clearly to indicate, however, that McDonnell's purpose was to insure that the tape recording that was being made disclosed that the respondent was fully aware of where he was and what he was doing.

[11]One factor identified by the court was that the officers asked the respondent whether he would consent to a search of his automobile. It is difficult to imagine how the officer's request made during the interview relates to the issue of seizure, as the court suggested. App. E, *infra*, 22A.

The court also stated that the officer's response to the respondent's request to see his wife was delayed, suggesting that the respondent had been temporarily deprived of an opportunity to speak privately with his wife. As the statement of the case *supra*, 8-9, demonstrates, however, the respondent's request was not motivated by a desire to confer with his wife privately, but by his expectation that his wife could provide McDonnell with additional facts relating to their out-of-state travel. The response was not delayed; the reason for the request was dissipated when McDonnell responded by saying that the details were not important. In fact, the respondent's later conversation with his wife was prompted by Sergeant Cudworth's suggestion and not a request by the respondent.

unambiguous detail concerning the initial encounter as to obviate the need for any retrospective reconstruction of the facts surrounding that encounter.

Instead, the question should properly be whether a lawful encounter was at some point transformed into an illegal seizure and, if so, when. *See United States v. Anderson*, 663 F.2d 934, 941 (9th Cir. 1981); *United States v. Richards*, 500 F.2d 1025, 1028 (9th Cir. 1974). The petitioner contends that if an informal seizure occurred at all in this case, it occurred at a point in time at which the police had probable cause to believe the respondent committed the killing. Assuming that the respondent made a clear request to leave the barracks when he said, "I'm pretty tired, you think I can go. . . ." (App. E, *infra*, 21A), it is evident that any constructive seizure at that point was supported by probable cause.[12]

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[12]Some of the more significant facts the police were then aware of were:

(1) the respondent had a serious and recent cut on his hand;

(2) the respondent had left the state hurriedly hours after the killing without making provision for the care of his dog or taking any clothes;

(3) the respondent mentioned the homicide and volunteered an explanation for the cuts on his hand to the officer who transported him to the barracks although no reason was even given for McDonnell's request to speak with the respondent and no one mentioned a homicide or the respondent's cuts;

(4) the respondent had AB type blood, the blood type found leading from the homicide scene to the adjacent parking lot, which was apparently then known to Captain McDonnell;

(5) the respondent had given inconsistent accounts of the times he went to Stanley's apartment, the events of his out-of-state travel during the week, and the events of the day of the killing; and

(6) the respondent finally admitted that it was possible that he was at the murder scene the night of the killing.

Certainly, these facts, taken together, are sufficient to warrant a prudent person, or one of reasonable caution, in believing in the circumstances shown, that the suspect probably committed the homicide. *See Michigan v. DeFillippo*, 443 U.S. 31, 37 (1979).

In any event, even a cursory review of the facts of this case discloses that the state supreme court's decision is markedly at odds with this Court's pronouncements in the area of Fourth Amendment seizures. *See* Sup. Ct. R. 17.1(c) (1980). This case is hardly similar to *Dunaway*. If the decision of the Connecticut Supreme Court is allowed to stand, the administration of criminal justice in the state would unnecessarily be thwarted. Investigatory encounters between citizens or potential suspects and the police would be severely restricted in a manner unwarranted by the Fourth Amendment. The holding of the case would have a substantial effect upon the decisions of trial judges, prosecutors and police. And this would take place at a time when the governmental response to the growing incidence of crime must become more effective, within the confines of the law, and not less so. To permit this decision to stand would be to ignore a clear misapplication of the Fourth Amendment and to foster its perpetuation in other cases.

2. If the trial court erred in admitting the respondent's confession and certain physical evidence, then that error was clearly harmless beyond a reasonable doubt and the Connecticut Supreme Court's failure to so conclude effectively expanded the requirements of the federal constitution contrary to the decisions of this Court.

As the statement of the case discloses, *supra*, 12-13, the respondent elected to take the stand at trial. In the course of his testimony he ratified and amplified the confession that he gave to police five days after the killing and used the description of events surrounding the killing contained therein to advance his defense of absence of mental capacity. Although raised by the petitioner in his brief before the state supreme court, that court failed to address the claim that these facts rendered any error in the admission of the challenged evidence harmless beyond a reasonable doubt. App. F,

infra, 24A. Under the circumstances, the petitioner contends that the requirements of *Chapman* have been satisfied and that the state supreme court's failure to so conclude constituted an unwarranted expansion of federal constitutional rights.

In *Chapman v. California*, 386 U.S. 18, 23 (1967), this Court concluded that "there may be some constitutional errors which in the setting of a particular case are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless, not requiring the automatic reversal of the conviction." It went on to hold that, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was "harmless beyond a reasonable doubt." *Id.*, 24. This holding was premised upon the conclusion that any harmless error rule that is applied to an error relating to a federal constitutional right is itself a federal question over which this Court has ultimate jurisdiction. *Id.*, 20-21.

It is, therefore, for this Court to decide under what circumstances a reviewing court may conclude that federal constitutional error was harmless. *See Fontane v. California*, 390 U.S. 593, 595-96 (1968). The petitioner contends that it is also for this Court to decide when a reviewing court must find federal constitutional error harmless. This is so because the ultimate authority for safeguarding federal constitutional rights resides with this Court. Lower courts of review ought not, by the application of self-devised harmless error rules, circumvent those rights. Nor ought lower courts of review enlarge the effect of a federal constitutional error beyond that warranted by the constitution itself. *See North Carolina v. Butler*, 441 U.S. 369, 376 (1979). As this Court said in *Butler, supra*, 376, "a state court can neither add to nor subtract from the mandates of the United States Constitution." This case, then, presents the reverse side of the question presented in *Chapman*, i.e., whether a lower court of review must, under certain circumstances, conclude that federal constitutional error was harmless beyond a reasonable doubt.

As applied to the facts of this case, the question is whether the federal constitution requires the reversal of a conviction and the suppression of the most probative evidence of guilt obtained through an alleged constitutional violation when the defendant at trial relies upon that very evidence in constructing his state of mind defense. Under the circumstances,[13] it is fair to say that the fact that the respondent caused the victim's death was not really at issue at trial. Instead, his state of mind at the time of the act was. Thus, under the typical formulation of the test for harmless constitutional error, the alleged error committed by the trial court in this case must be deemed to be harmless beyond a reasonable doubt. *See Brown v. United States*, 411 U.S. 223 (1973) (tainted evidence merely cumulative of other overwhelming and largely uncontroverted evidence properly before jury); *Schneble v. Florida*, 405 U.S. 427 (1972) (overwhelming independent evidence of guilt); *Harrington v. California*, 395 U.S. 250 (1969) (overwhelming evidence of guilt). The state supreme court's failure to so conclude constituted an unprecedented and unwarranted expansion of a federal constitutional right.

No interest sought to be protected by the Fourth Amendment would be advanced by finding harmful the erroneous admission of evidence that was proferred by the state and thereafter relied upon by the defendant. The state's interest in the fair and efficient administration of criminal justice, on the other hand, would be thwarted if a new trial is unnecessarily required in this case.[14] Moreover, the decisions of this

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[13]The respondent never indicated at trial that he was ratifying the confession only because his motion to suppress had been denied. Indeed, the defense strategy, of which the respondent gave notice prior to trial, was to admit the act but contest existence of the required state of mind.

[14]Even if a new trial were held in this case, there appears to be no reason why the respondent's in-court confession could not then be

Court indicating that the existence of federal constitutional error does not in itself mandate reversal of a criminal conviction would be seriously undermined.

3. This Court should adopt a good-faith exception to the exclusionary rule and apply it to this case.

As this Court has recognized, the exclusionary rule is not itself a requirement of the Constitution but rather a judicially devised remedy to deter future police misconduct.[15] *Stone v. Powell*, 428 U.S. 465, 482-86 (1976); *United States v. Janis*, 428 U.S. 433, 446 (1976). For that reason, this Court has not required the exclusion of illegally seized evidence where to do so would not effectuate the deterrent purpose of the rule. *See United States v. Paynor*, 447 U.S. 727 (1980) (illegal seizure of evidence from a third party not before the court); *United States v. Havens*, 446 U.S. 620 (1980) (evidence illegally seized admissible for impeachment); *United States v. Ceccolini*, 435 U.S. 268 (1978) (testimony of witness located as a result of illegal seizure); *United States v. Janis*, 428 U.S. 433 (1976) (evidence illegally seized in good faith admissible in taxpayer's civil suit); *United States v. Calandra*, 414 U.S. 338 (1974) (grand jury witness could be required to answer questions based on evidence illegally seized); *see also Stone v. Powell, supra* (where state courts have provided an opportunity for full and fair litigation of a Fourth Amendment claim, federal habeas relief not

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used against him since any taint created by the allegedly illegal seizure on April 16, 1977, was surely dissipated by the time the respondent testified at trial with the advice of counsel some eighteen months later. *See Brown v. Illinois*, 422 U.S. 590, 603-604 (1975); *Wong Sun v. United States*, 371 U.S. 471, 487-88 (1963).

15 To the extent that the "imperative of judicial integrity" continues to provide any justification for the exclusionary rule; *see United States v. Peltier*, 442 U.S. 531, 536-38 (1975); *Stone v. Powell*, 428 U.S. 465, 485 (1976); it is apparent that that judicial interest is not offended where police act upon an albeit erroneous good-faith belief that their conduct is lawful. *Ibid.*, 485 n.23.

available on ground that illegally seized evidence was not suppressed at trial).

This Court's recognition of the inappropriateness of applying the exclusionary rule where to do so would not advance its purpose is the premise of the petitioner's argument in this case.[16] That is, the petitioner considers it entirely futile to speak of deterring police conduct by excluding evidence in a case in which the police acted with a reasonable, good-faith belief that their conduct was proper. If officers reasonably believe that they are acting within the requirements of the law, then there is nothing to deter, i.e., one cannot under those circumstances deter ignorance of the law on the part of the police, their belief being reasonable, or their intention to violate the law, there being none. *See Michigan v. Tucker,* 417 U.S. 433, 447 (1974); *see also Brown v. Illinois,* 422 U.S. 590, 612 (1975) (Powell, J., concurring).

On the other hand, to exclude evidence that is obtained under those circumstances exacts a tremendous price from the criminal justice system. *See Bivens v. Six Unknown Named Agents of Fed Bur. of Narc.,* 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting). Public respect for the courts is not heightened when the public witnesses the courts turning their backs on evidence that may all but conclusively establish a defendant's guilt. Nor does the exclusion of evidence probative of guilt or innocence square with the avowed purpose of a criminal trial, the search for the truth. It is under most circumstances exceedingly difficult to reconstruct the facts surrounding the commission of a crime. It may be impossible to do so where evidence

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[16] Indeed, this Court went so far as to state in *United States v. Peltier,* 422 U.S. 531, 542 (1975): "[E]vidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment."

that is often most probative of guilt or innocence is deliberately excluded from the trial. And while those involved in the administration of criminal justice, no less than others, cherish the personal rights conferred by the United States Constitution, it has become increasingly difficult for them to attempt to justify the costly application of a remedy that remedies nothing at all.

The growing frustration with the senseless application of the exclusionary rule has prompted several courts to recognize exceptions to the rule's application similar to the one that the petitioner here proposes. *See United States v. Ajlouny*, 629 F.2d 830, 840-42 (2d Cir. 1980), *cert. denied*, 449 U.S. 1111 (1981) (good-faith mistake of law); *United States v. Williams*, 662 F.2d 830, 846 (5th Cir. 1980), *cert. denied*, 449 U.S. 1127 (1981) (good-faith mistake of law); *Nix v. State*, 621 P.2d 1347, 1349-50 (Alas. 1981) (consent to search; good-faith mistake of fact); *Richmond v. Commonwealth*, 29 Cr. L. Rptr. 2529 (Ky. Sept. 23, 1981) (mistake of law); *People v. Adams*, 53 N.Y.2d 1, 442 N.E.2d 537 (1981) (exigency; mistake of fact); *Commonwealth v. Bradshaw*, ___ Pa. Super. Ct. ___, 434 A.2d 181, 183 (1981) (good-faith but mistaken belief in informant's information); *see also Robberson Steel Co. v. Occupational Safety & Health Review Commission*, 645 F.2d 22 (10th Cir. 1980) (non-retroactive application of rule). In each of these cases, the courts wisely applied the principle that "[w]here the reason for the rule ceases, its application must cease also." *United States v. Williams, supra*, at 840; *see* Attorney General's Task Force on Violent Crime, 29 Cr. L. Rptr. 3131, 3134 (1981).

The exception proposed by the petitioner in this case is essentially that adopted by the Fifth Circuit in *Williams*. Thus, evidence obtained through illegal police conduct would not be excluded if the court concludes that the conduct in question "was taken in a reasonable, good-faith belief that it was proper." *Id.* at 847. The

reasonableness of any belief in the legality of the action taken is an essential component of the exception. Thus, no matter how sincerely held, any belief that the conduct taken was lawful that is not objectively reasonable, is of no consequence. Without such a provision, any exception to the exclusionary rule would encourage, if not reward, police ignorance of constitutional rights. *See Stone v. Powell*, 428 U.S. 465, 538 (1976) (White, J., dissenting).

If applied to the facts of this case, such a good-faith exception to the exclusionary rule would plainly be warranted.[17] The subjective good faith of the police in this case is apparent from the record. *See Brown v. Illinois*, 422 U.S. 590, 604 (1975). The fact that the police advised the respondent explicitly that he was not under arrest at the commencement of the interview at the barracks, the absence of any formal arrest or restraint, the care taken in advising the respondent of his *Miranda* rights, the attempt to secure an attorney for the respondent after he declined to obtain one, the suggestion at one point in the interview that the respondent confer with his wife and her presence while the respondent confessed, all attest to the fact that the police involved were not intent upon riding roughshod upon the respondent's constitutional rights. *See Dunaway v. New York*, 442 U.S. 200, 226 (1979) (Rehnquist, J., dissenting); *cf. Brown v. Illinois*, 442 U.S. 590, 605 (1975). With regard to the existence of a subjective good-faith belief that the respondent was not in custody at the time of the interview, the fact that

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[17] Although the argument that a good-faith exception to the exclusionary rule should be applied to this case was not made before the state supreme court, it is apparent that state courts may not authoritatively alter federal constitutional law as interpreted by this Court. To have urged the state supreme court to have done so in this case would have amounted to the proposition of a claim of law before a tribunal that is incompetent to rule definitively upon it. Moreover, to have raised this particular claim in the state court would not have facilitated this Court's consideration of it.

Captain McDonnell assured the respondent, who was feeling tired, that he should not worry about driving because "[w]e'll drive you where-ever [sic] you end up wanting to go," *supra*, 15, evidences the officers' subjective belief that the respondent was not in custody at the time and, therefore, that no violation of the law had occurred.

The objective reasonableness of their belief is equally apparent. As noted above, although their conduct preceded this Court's decision in *Dunaway v. New York*, 442 U.S. 200 (1979), the facts of this case are unlike those in *Dunaway*, which militated toward a finding of unlawful seizure. Not only did the police not formally arrest the respondent at the time he was escorted to the Litchfield barracks, they engaged in no conduct that had before then been defined as constituting constructive arrest or seizure. Finally, it is of more than passing significance that three judges of the state's superior court empaneled to try one of the most serious offenses under state law unanimously concluded, even after this Court's decision in *Dunaway*, that the respondent was not unlawfully seized prior to his formal arrest. A reasonably trained law enforcement officer ought not be expected to exceed the knowledge and training of three judges of the state's superior court.

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the Supreme Court of Connecticut or, in the alternative, vacate and reverse the judgment of that court.

Respectfully submitted.

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No._____

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

APPENDIX

APPENDIX A

FINDING OF THE TRIAL COURT REGARDING CUSTODY FOR MIRANDA PURPOSES
(unpublished)

Court:

As far as we understand the situation on this, that he is not in custody, basically, that he is called in, and as an accommodation the Sergeant is driving him to the Barracks, and the Sergeant has indicated he doesn't know anything about the homicide in question except it is probably one of the items of routine nature that he hears, but he is not aware of anything involved in it other than Captain McDonnell was anxious to talk to the Defendant. This is our understanding of the testimony now. So –

Defense counsel:

I submit, Your Honors, that once he is put in that police cruiser on his way to the Barracks, that he was in custody, even though, according to the police officer, he called Captain McDonnell voluntarily. I think he was in custody.

Court:

The testimony seems to indicate he has his choice to either follow the cruiser to the Litchfield Barracks or to all come to the Barracks in one car. And the testimony is that it is more convenient they all go in the cruiser together. So, as far as the Court, we will allow it. Exception may be noted.

Transcript at 382-83.

APPENDIX B

INQUIRY CONDUCTED PRIOR TO RESPONDENT'S TESTIMONY AT TRIAL

MR. CONNOR: Your Honors, before I call Mr. Richard Ostroski, I would like to ask Mr. Ostroski some questions.

JUDGE DALY: Do you want him to sit on the stand up here and you can pose those?

MR. CONNOR: Perhaps we can do it here. Mr. Ostroski, I have told you on many occasions during our discussions that you have the right to remain silent, is that true?

MR. OSTROSKI: Yes, sir.

MR. CONNOR: You do not have to testify unless you wish to.

MR. OSTROSKI: Correct.

MR. CONNOR: You have a constitutional right to remain silent, and neither the State's Attorney, if you chose to remain silent, the State's Attorney cannot make any adverse comment about that to the Judges in the case, and, also, if you choose to remain silent, the Judges cannot consider that against you adversely, if you want to remain silent. I have also told you that if you do choose to testify, you can be subject to cross-examination, is that true?

MR. OSTROSKI: Yes, sir.

MR. CONNOR: And that you would be treated like any other witness who has testified.

MR. OSTROSKI: Yes, sir.

MR. CONNOR: Now, what is your wish, do you wish to testify or remain silent?

MR. OSTROSKI: I wish to testify.

MR. CONNOR: Do Your Honors have any questions to ask him at this time?

JUDGE DALY: You have thought this over, Mr. Ostroski, very thoroughly, have you?

MR. OSTROSKI: Yes, I have, sir.

JUDGE DALY: All right. And having thought it over and discussed the matter thoroughly with Mr. Connor, you have reached a decision that you have just enunciated, that you will testify in the case?

MR. OSTROSKI: Yes.

JUDGE DALY: You may call your first witness, Mr. Connor.

MR. CONNOR: I would call Mr. Richard Ostroski.

Transcript at 830-31.

APPENDIX C

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT

(as reported in 42 Connecticut Law Journal, No. 51, pp. 13-16 (1981))

STATE OF CONNECTICUT *v.* RICHARD OSTROSKI

BOGDANSKI, C. J., SPEZIALE, PETERS, HEALEY and ARMENTANO, JS.

Argued April 8 — decision released June 16, 1981

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to a three judge court, *Parskey, Daly* and *Foti, Js.;* judgment of guilty and appeal by the defendant. *Remanded with direction.*

Joette Katz, assistant public defender, with whom, on the brief, were *Jerrold H. Barnett,* public defender, and *Michael Connor, Jr.,* assistant public defender, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *Richard Maloney,* assistant state's attorney, for the appellee (state).

PER CURIAM. The defendant was indicted for the murder of a young woman in her Canton apart-

ment. After a trial before the court, consisting of a panel of three judges of the Superior Court,[1] the defendant was found guilty and sentenced to a prison term of not less than twenty-five years nor more than life. During the trial the court heard evidence and argument on the defendant's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut." In denying the motion the court orally stated that the defendant was under "apparent custodial interrogation." We remand the case for further articulation of the issue of custody so that this court can properly review the admissibility of the defendant's incriminating statements and various items of physical evidence.

During the night of April 11-12, 1977, a nineteen-year-old woman was brutally stabbed to death in her Canton apartment. When the defendant learned that Captain McDonnell of the state police wanted to talk with him, the defendant called the state police barracks at Litchfield from a telephone booth in New Milford. Because the defendant was unfamiliar with the area, a New Milford police officer was sent to the defendant's location. In his own car the defendant followed the officer to the New Milford police station. From there the defendant together with his wife and child rode in a state police car to the Litchfield barracks with a state trooper.

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[1] General Statutes § 54-82 (b) provides: "If the accused is charged with a crime punishable by death or imprisonment for life and elects to be tried by the court, the court shall be composed of three judges consisting of the judge presiding at the session and two other judges to be designated by the chief justice. Such judges, or a majority of them, shall have power to decide all questions of law and fact arising upon the trial and render judgment accordingly."

Upon arrival at the Litchfield barracks the defendant was informed that he was not under arrest. Captain McDonnell read aloud from a form listing the *Miranda* rights and the defendant read aloud the portion of the form indicating that he understood those rights and chose not to exercise them. See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). During the ensuing conversation the defendant made incriminating statements and authorized an examination of his person and his property. The defendant was then formally placed under arrest.

The defense counsel at trial objected to the admission of the defendant's statements on fifth amendment grounds, contending primarily that the defendant had asserted his right to remain silent but the police did not then terminate the interview. Objection also was raised to the admission of certain physical evidence as being the fruit of the inadmissible confession.

In ruling that the defendant's *Miranda* rights were not violated, the trial court orally stated that the defendant was under "apparent custodial interrogation."[2] When asked by defense counsel to

[2] The trial court stated: "On April 16, 1978, [sic] the Defendant voluntarily came to the Litchfield Barracks with his wife and child, that the Defendant was under apparent custodial interrogation at the time, he was given his *Miranda* right warnings. There is a distinction in the *Miranda* warnings from the right to obtain counsel and the right to remain silent. And we are dealing with the right to remain silent in this matter here, and to terminate the custodial interrogation. There is some question with respect to the statements made in transcript as to whether or not equivocally or unequivocally the Defendant asked that the interrogation cease. If we find that there is no equivocation, then that would settle the matter there. If we find there is some question on the matter, then we proceed to whether or not there was a waiver of the rights. And as far as the Panel is concerned on it, we do find there was no violation of the *Miranda* rights involved herein, and in accordance with *State* v. *Staples*, [175 Conn. 398, 399 A.2d 1269 (1978)] we make a finding that the confession is voluntarily, knowingly and intelligently made, and may be admitted into evidence."

elaborate, the trial court described its finding of custody in these words: "[I]t is apparent custodial interrogation, he was given his rights, we focused it on the basic one that you challenged, the right to cease interrogation, that is what we came down to, and that is, I think, the nub of the whole argument that the Defendant raised, so we didn't go into superfluous matters that didn't seem to bear on this particular issue."

The ambiguity of the word "apparent" in the phrase "apparent custodial interrogation" and the trial court's own explanation of its thought processes indicate that the "finding" that the defendant was in custody at the time of his April 16, 1977 interview with the state police was merely an hypothesis which the trial court assumed in order to reach the fifth amendment issue of the protection of the defendant's right to remain silent. Whether and when a person is taken into custody is a question of fact. *State* v. *Derrico*, Conn. (41 Conn. L.J., No. 50, pp. 7, 10), cert. denied, U.S. , 101 S. Ct. 789, 66 L. Ed. 2d 607 (1980). It is the function of the trial court, not this court, to find facts. Whether or not the defendant was in custody is a critical threshold question which must be determined before we can properly review the claims made in this appeal. It is, therefore, necessary to remand this case for a further articulation of the trial court's decision on the custody issue.

On appeal the defendant renews his fifth amendment claims and for the first time also claims fourth amendment violations. He then urges suppression of his incriminating statements and certain physical evidence obtained after those violations. The defendant insists that he was unreasonably seized without probable cause at the time he left his own car at New Milford and entered the state police car for the ride to Litchfield, or at least at the time he

entered the Litchfield barracks. Although at oral argument before us the state conceded that at the time of the defendant's arrival at the Litchfield barracks there was no probable cause to arrest or detain the defendant,[3] the state argued that the defendant was not in custody during the interrogation there.

Although the fourth amendment claims were not distinctly raised at trial, the defendant has urged that these claims be considered under the "new constitutional right" branch of the exceptional circumstances doctrine of *State* v. *Evans*, 165 Conn. 61, 70, 327 A.2d 576 (1973). See Practice Book § 3063. The claimed "new constitutional right" is based on the posttrial decision of *Dunaway* v. *New York*, 442 U.S. 200, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979). In *Dunaway* the United States Supreme Court ruled that statements made by the defendant in the police station interrogation room were inadmissible because of their causal connection with the earlier fourth amendment violation where, without probable cause, a police cruiser was sent to find the suspect and bring him in for questioning; and although no formal arrest was made, the police admitted that they would have compelled the defendant to come with them if he had resisted. Because of the necessity to remand for a further articulation of the trial court's finding of "apparent" custody for fifth amendment purposes and in the interest of justice, we direct the trial court to include in its articulation of the custody issue a

[3] There need not be a formal arrest for fourth amendment protections to apply. *Rawlings* v. *Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Davis* v. *Mississippi*, 394 U.S. 721, 726-27, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969). Because the state has conceded that there was not probable cause to arrest or detain, we need not consider what would constitute probable cause in this case. See *Dunaway* v. *New York*, 442 U.S. 200, 216, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979).

consideration of the fourth amendment right to be "secure in their persons . . . against unreasonable searches and seizures." U.S. Const., amend. IV. See *United States* v. *Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980); *Oregon* v. *Mathiason*, 429 U.S. 492, 495, 97 S. Ct. 711, 50 L. Ed. 2d 714 (1977).

The supervision of a case on appeal is in the Supreme Court. Practice Book § 3096; *State* v. *McCarthy*, 167 Conn. 472, 477, 356 A.2d 165 (1975). Where "necessary to the proper disposition of the cause," this court may "remand the case for a further articulation of the basis of the trial court's decision." Practice Book § 3060D; *Powers* v. *Powers*, Conn. (42 Conn. L.J., No. 33, pp. 12, 13) (1981); *Robertson* v. *Apuzzo*, 168 Conn. 671, 337 A.2d 544 (1975), on full hearing, 170 Conn. 367, 370, 365 A.2d 824, cert. denied, 429 U.S. 852, 97 S. Ct. 142, 50 L. Ed. 2d 126 (1976); *Davis* v. *P. Gambardella & Son Cheese Corporation*, 147 Conn. 365, 367n, 161 A.2d 583 (1960). For the reasons set forth above, sua sponte we remand this case for further articulation.

With particular reference to the issue of custody as it affects the defendant's fourth and fifth amendment rights, it is ordered that the trial court file a memorandum of decision articulating the basis for its ruling which permitted the admission of evidence of the defendant's inculpatory statements and also permitted the admission of testimony and physical evidence resulting from the defendant's oral and written consent.

APPENDIX D

OPINION OF TRIAL COURT AFTER REMAND FOR FURTHER ARTICULATION
(unpublished)

ARTICULATED MEMORANDUM OF DECISION

The Supreme Court Opinion dated June 16, 1981, has set forth the preliminary details prior to defendant's arrival at the Litchfield barracks.

Defendant had contacted Captain McDonnell pursuant to a telephone conversation with his mother.

Defendant went upstairs to a room on the second floor of the barracks along with Captain Thomas McDonnell of the State Police and Sgt. Stephen Cudworth of the Canton Police Department. The interview commenced about 8:15 P.M. on April 16, 1977.

The defendant was advised of his *Miranda* rights by Captain McDonnell. Defendant was advised at least twice that he was not under arrest. Defendant indicated that he was fully aware of his rights. He had had prior experience with the police.

Defendant was not handcuffed.

Defendant's wife, Beverly, and their child were elsewhere in the barracks.

Defendant agreed to provide hair samples and to have his private physician divulge his blood type.

At first defendant was reluctant to have his motor vehicle searched, but later changed his mind.

His fingerprints were already on file with the police.

Defendant indicated on two occasions that he felt tired and would like to get going as soon as possible.

At first he felt that they would go to a motel since their motor vehicle was not at the barracks, but then wanted to return to their car and go home.

His wife Beverly was later brought into the interview room. They conversed privately. Beverly Ostroski indicated that on the morning of the homicide defendant arrived home around 2 A.M. with no blood stains. No blood stains were seen by her in their motor vehicle.

Defendant confessed in his wife's presence.

Defendant was arrested at 11:34 P.M. and was again advised of his rights. He refused to talk further and requested an attorney.

The interview was then concluded.

The purpose of the fourth amendment is not to eliminate all contact between the police and the citizenry, but to prevent arbitrary and oppressive interferences

by government officials with the privacy and personal security of individuals. As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as under the constitution would require some particularized and objective justification.

We conclude that a person has been seized within the meaning of the fourth amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Some examples of seizure are: several officers present, a display of a weapon, a touching of the defendant, or use of language or tone of voice indicating officer's request might be compelled. *United States v. Mendenhall*, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed. 2d 497, 509 (1980).

None of the aforesaid examples are applicable to our situation.

Nor does the *Dunaway v. New York*, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed. 2d 824 (1979) appear to apply, since the police picked up the suspect even though they lacked probable cause to obtain a warrant for his arrest. Furthermore, he was taken into custody, not told that he was under arrest, and would have been restrained had he attempted to leave.

By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way. *Miranda v. Arizona*, 384 U.S. 436, 444, 86 S.Ct. 1602, 16 L.Ed. 2d 694 (1966).

However, in the present case there is no indication that the questioning took place in a context where defendant's freedom to depart was restricted in any way. He came voluntarily to the police station barracks, where he was immediately informed that he was not under arrest. He was given and repeated his *Miranda* rights. In the presence of his wife, he made his confession. At most it could be deemed a coercive environment not converted to a custodial situation. *Oregon v. Mathiason*, 429 U.S. 492, 97 S.Ct. 711, 50 L.Ed. 2d 714 (1977).

We conclude that the defendant was taken into custody in the fourth amendment sense when he was placed under arrest. In this case we are not limited to recreating the scene at the police barracks from the testimony of witnesses. The taped recording of the interrogation is there for all to hear. A fair hearing of the tape reveals that the questioning was slow and methodical. The defendant was not subjected to threats or hints of threats. He answered questions freely and voluntarily. There is no point from the beginning to the end of the questioning where we can find any change in atmosphere which would justify a conclusion that his status had changed from a possible suspect freely

answering investigative questions to that of an actual suspect being subjected to custodial interrogation.

/s/
Daly, J.

/s/
Parskey, J.

/s/
Foti, J.

APPENDIX E

OPINION OF THE SUPREME COURT OF THE STATE OF CONNECTICUT (as reported at 186 Conn. 287 (1982))

STATE OF CONNECTICUT *v.* RICHARD OSTROSKI

SPEZIALE, C. J., PETERS, HEALEY, ARMENTANO and BIELUCH, Js.

The test of whether one is "seized" or taken into custody within the meaning of the fourth amendment to the United States constitution is whether, under the totality of the circumstances surrounding the "seizure," a reasonable person would believe that his freedom of movement has been restrained. A seizure effected without probable cause is unreasonable and thus violative of the fourth amendment.

This court, following the defendant's appeal to it from his conviction by a three-judge court of the crime of murder, remanded the matter to that court to determine whether the defendant had been in the custody of the state police when, during the course of a three-hour interrogation by them at their Litchfield barracks, he confessed to the murder and authorized an examination of his person and property. During the course of that three-hour interrogation, his repeated requests to leave the barracks were not granted, although he had been told that he was not under

arrest, and although, as the state concedes, he had been taken there without probable cause. Upon the trial court's determination, on the remand, that the defendant had not been in custody, the matter was again argued before this court. Because there was no probable cause to seize the defendant and because under the totality of the circumstances here his detention constituted a seizure, *held* that the trial court erred in determining that he was not in police custody during the interrogation and in admitting into evidence the incriminating statements and the physical evidence taken from him during the interrogation.

Argued October 16, 1981—decision released February 23, 1982

Indictment charging the defendant with the crime of murder, brought to the Superior Court in the judicial district of Hartford-New Britain at Hartford and tried to a three-judge court, *Parskey, Daly* and *Foti, Js.*; judgment of guilty, from which the defendant appealed to this court, which remanded the case to the trial court for further articulation, and the parties have reargued the cause. *Error; new trial.*

Joette Katz, assistant public defender, with whom, on the brief, was *Jerrold H. Barnett,* public defender, for the appellant (defendant).

Ernest J. Diette, Jr., assistant state's attorney, with whom, on the brief, were *John M. Bailey,* state's attorney, and *Richard E. Maloney,* assistant state's attorney, for the appellee (state).

Speziale, C. J. During the night of April 11-12, 1977, a nineteen-year-old woman was brutally stabbed to death. The defendant was indicted for her murder and after a trial before the court, consisting of a panel of three judges of the Superior Court, he was found guilty and sentenced to a prison term of

not less than twenty-five years nor more than life. During the trial the court heard evidence and argument on the defendant's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut." The trial court denied the motion and orally stated that the defendant was under "apparent custodial interrogation." We remanded the case for further articulation of the threshold issue of custody, so that we could properly review the admissibility of the defendant's incriminating statements and various items of physical evidence. *State* v. *Ostroski*, Conn. (42 Conn. L.J., No. 51, p. 13) (1981). On remand the trial court found that the defendant was not in custody until his formal arrest following his confession. We disagree.

After the murder the defendant was identified by photograph as one who had been seen in the apartment house of the victim a few days before the killing. The police left messages with his family for him to call. On April 16, 1977, when he learned that Captain McDonnell of the state police wanted to talk with him, the defendant called the state police barracks at Litchfield from a telephone booth in New Milford. Because the defendant was unfamiliar with the area, a New Milford police officer was sent to the defendant's location. In his own car the defendant followed the officer to the New Milford police station. From there the defendant together with his wife and child rode in a state police car to the Litchfield barracks with a state trooper.

Upon arrival at the Litchfield barracks the defendant was informed that he was not under arrest.

Captain McDonnell read aloud from a form listing the *Miranda* rights and the defendant read aloud the portion of the form indicating that he understood those rights and chose not to exercise them. See *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). In the course of the questioning the defendant appeared to discover, and stated, that he had done the act in a drunken, drugged state. He made incriminating statements and authorized an examination of his person and his property. The interrogation, which commenced at 8:15 p.m., was tape-recorded, and the transcription of it is a part of the record in this case. As a result of his confession the defendant was formally arrested at 11:34 p.m.

On appeal the defendant claims error in the admission of his confession and various items of physical evidence.[1] Whether the confession and physical evidence are admissible turns on the answers to two subsidiary questions: (1) whether the defendant was "seized" within the meaning of the fourth amendment to the United States constitution and article first, § 7 of the Connecticut constitution so as to invoke their protection, and, if so, (2) whether he was "reasonably" seized, that is, whether there was probable cause to seize him. *State* v. *Derrico*, 181 Conn. 151, 157–58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 780, 66 L. Ed. 2d 607 (1980); *Dunaway* v. *New York*, 442 U.S. 200, 99

[1] The defendant also claims that the instructions to the grand jury violate the rule of *Sandstrom* v. *Montana*, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979), because the instruction on intent contained the following language: "Concerning the word intent, I ought to say that ordinarily men are presumed to intend the results which follow their acts." This issue has been resolved adversely to the defendant's claim by this court in *State* v. *Stepney*, 181 Conn. 268, 435 A.2d 701 (1980), and requires no further consideration.

S. Ct. 2248, 60 L. Ed. 2d 824 (1979).[3] Because the state has conceded that there was no probable cause to seize the defendant at the time he was taken to the Litchfield barracks, the only question for this court is whether the defendant was seized at the time he was taken there. We conclude that the defendant was seized at the time he was taken to the Litchfield barracks and that the trial court erred in admitting the confession and physical evidence obtained as a result of the interrogation at the Litchfield barracks on the night in question, which interrogation violated the defendant's fourth amendment protection against unreasonable seizures.

The test of whether a person has been "seized" so as to invoke the protection of the fourth amendment has been set out by the Supreme Court of the United States: "[A] person is 'seized' only when by means of physical force or a show of authority, his freedom of movement is restrained. . . . As long as the person to whom questions are put remains free to disregard the questions and walk away, there has been no intrusion upon that person's liberty or privacy as would under the Constitution require some particularized and objective justification. . . . We conclude that a person has been 'seized' within the meaning of the Fourth Amendment only

[3] It should be noted that it is also necessary that acquisition of the evidence sought to be suppressed be causally related to the illegal seizure. *State* v. *Derrico*, 181 Conn. 151, 157–58, 434 A.2d 356, cert. denied, 449 U.S. 1064, 101 S. Ct. 780, 66 L. Ed. 2d 607 (1980). Put another way, evidence obtained after an illegal arrest or seizure may be admissible if there is some intervening act sufficient to purge the evidence of the taint of the illegal detention. See *Brown* v. *Illinois*, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975); *Wong Sun* v. *United States*, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). The state has not argued that there was such an intervening act in this case and nothing in the record before us suggests that there was such an intervening act.

if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *United States* v. *Mendenhall*, 446 U.S. 544, 553–54, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980).

Whether there has been such a seizure in an individual case is a question of fact. *State* v. *Ostroski*, Conn. (42 Conn. L.J., No. 51, pp. 13, 14) (1981). *State* v. *Derrico*, 181 Conn. 151, 158, 434 A.2d 356 (1980); *State* v. *Love*, 169 Conn. 596, 600, 363 A.2d 1035 (1975). Courts have found seizure: where a defendant "was taken from a neighbor's home to a police car, transported to a police station, and . . . would have been physically restrained if he had refused to accompany the officers"; *Dunaway* v. *New York*, 442 U.S. 200, 212, 99 S. Ct. 2248, 60 L. Ed. 2d 824 (1979); where a defendant "was separated from his two companions and placed in one of the police cruisers with a uniformed officer"; *United States* v. *Blum*, 614 F.2d 537, 540 (6th Cir. 1980); and where "two officers informed [the defendant], following an hour's interrogation, that he was the last person with the murder weapon before the victim's death and that they believed he knew more about the crime than he had revealed." *State* v. *Menne*, 380 So. 2d 14, 17 (La.), cert. denied, 449 U.S. 833, 101 S. Ct. 104, 66 L. Ed. 2d 39 (1980).

We conclude that when the facts of this case are measured by the above standard they constitute a seizure protected by the fourth amendment. The evidence is that when the defendant called, he asked to go in "tomorrow" but the trooper said he "should come in tonight." The defendant was not informed that he could leave at any time. He was told, "you

realize your [sic] at the State Police . . . Barracks okay, it's not a hotel or anything like that." On arrival at the Litchfield barracks, the defendant was separated from his wife and child. He had no car in which to leave because his car had been left in New Milford.

On several occasions the defendant asked to leave. The defendant said to Captain McDonnell, "I'd really like to get going as soon as possible, I'm beat." The police responded not to his request to leave, but to his reason for asking to leave: "Okay, doing a lot of driving . . . ?" and "Did you do all the driving or did the wife do some?" The defendant repeatedly pressed his request to leave. He interrupted his account of his drinking on the day of the murder with, "I'm not sure, see I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob . . . liable to, start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good." The police again were unresponsive, addressing only his reason for asking to leave, that he might say something incriminating, and assuring him that what he said was not incriminating: "[T]here's no crime against, ya know, telling me you were drunk." Next, the defendant said, "Can I at least get on the road pretty soon?", indicating that he thought his previous requests to go had been rebuffed, that another request to go would also be rebuffed, so he would settle for at least going "pretty soon." That request too was deflected with a response that he didn't need to go for the reason that he would have to drive because they would drive him. In response, the defendant tried yet again: "I want to go back to my car and then from there I'm gonna go, I'll go

home, I'll go home, crimidy sakes, cuz I'm so tired," and asked for an answer, "So, what do you think?" The police, again instead of answering his question, answered a different question: "I think you killed this girl Ricky."

Of course, what counts is not what the defendant believed, but what a reasonable person would have believed in view of all the circumstances. It is plain that a reasonable person would have believed that he was not free to leave in view of these circumstances: where one is summoned now, and "tomorrow" will not do; where one is separated from one's car and taken in a police car to the police barracks; where one is dependent on one's interrogators for the means to leave; where one's interrogators refuse to honor requests to leave; where one's interrogators refuse to honor a request to stop questioning; where the response to a request to see one's spouse is delayed; where the interrogation lasts more than three hours; where one's interrogators ask one's consent to search one's car to take various physical evidence; where one's interrogators say, "I think you killed this girl." We conclude that in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. *United States* v. *Mendenhall*, supra.

Accordingly, the determination of the trial court that the defendant was not in custody is clearly erroneous. See *Pandolphe's Auto Parts, Inc.* v. *Manchester*, 181 Conn. 217, 221–22, 435 A.2d 24 (1980); *Stelco Industries, Inc.* v. *Cohen*, Conn. (42 Conn. L.J., No. 26, pp. 4, 5) (1980); Practice Book § 3060D. It was error for the court to admit the incriminating

statements and the physical evidence because they were the result of an illegal detention, the interrogation at the Litchfield barracks.

There is error, the judgment is set aside and a new trial is ordered.

In this opinion the other judges concurred.

APPENDIX F

EXCERPT FROM THE PETITIONER'S BRIEF BEFORE THE CONNECTICUT SUPREME COURT

By way of editorial comment, however, the Appellee will simply aver that the sole significant issue argued in his brief – i.e., the voluntariness of his confession – was surely of little consequence in a murder case in which the Defendant admitted that he took the life of Kim Steacy but – in a "confession and avoidance" sense – presented a defense of diminished capacity due to the ingestion of alcohol and drugs and that he was incapable of having the mental state required for the offense charged. (See Notice; Rec. p. 15). In a practical sense, therefore, the Appellant's fate hinged not on whether the three-judge panel believed his confession but, rather, the extent to which his own testimony about his diminished capacity, as well as that of his expert witnesses, was credited. Since the confession of the Defendant – at the least – suggested that he possessed a mental block against recollection of the killing of Kim Steacy and only came to realize – through gradual "flashbacks" – that he had performed the acts, the confession itself (whether involuntarily obtained or not!) could only have inured to the Defendant's benefit in his efforts to show that he was inacapable of having the requisite intent at the time of the homicide.

Within this context, any error by the court in admitting the tape and transcript of the Defendant's statement as evidence would surely be harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); *Wilson v. Henderson*, 584 F.2d 1185, 1189 (2nd Cir. 1978).

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NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether Respondent was seized in violation of the Fourth Amendment when he was brought to and interrogated at the state police barracks on April 16, 1977?

2. If Respondent was seized prior to his formal arrest following his confession on April 16, 1977, may this Court consider whether that seizure occurred at a point in time at which the police had probable cause to believe he had committed murder where Petitioner expressly conceded in the courts below that it did not have such probable cause until Respondent had actually confessed?

3. Whether the admission of Respondent's confession and certain physical evidence obtained as a result of that confession was harmless beyond a reasonable doubt where there has been no showing that Petitioner's illegal action did not induce Respondent's trial court testimony?

4. Whether a good-faith exception to the exclusionary rule should be adopted and applied in this case where this claim was not raised, preserved, and passed upon in the courts below and a lack of good faith is apparent from the record?

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STATUTES

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NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

RESPONDENT'S BRIEF IN OPPOSITION

STATEMENT CONCERNING JURISDICTION

For the reasons discussed at length infra, this Court lacks jurisdiction under 28 U.S.C. §1257(3) to consider questions (2) and (4) presented by the Petition since those questions were never raised, preserved, or passed upon in the courts below. There are, moreover, no special and important reasons for reviewing any of the questions presented. See S.Ct. Rule 17.1.

STATEMENT OF THE CASE

I. PRELIMINARY DISCUSSION

On October 19, 1978, Respondent was convicted of the crime of murder in violation of Conn. Gen. Stat. §53a-54a by a three judge court.[1] On November 27, 1978, he was sentenced to a term of imprisonment of not less than twenty-five years nor more than life.

Ultimately, after two appeals, Respondent's conviction was set aside, and a new trial was ordered. The reversal was predicated upon the determination by the Supreme Court of Connecticut that Respondent had been seized and held in custody without probable cause. The Court held that the admission at Respondent's trial of his confession and the physical evidence obtained as a result of his custodial interrogation violated the Fourth Amendment's protection against unreasonable seizures.

II. EVIDENCE, ARGUMENTS, FINDINGS, AND RULINGS AT THE TRIAL

During the night of April 11-12, 1977, Kim Steacy was stabbed to death in her apartment on Main Street in the Village of Collinsville, located in the Town of Canton, Connecticut. The homicide was discovered by Donald Miller, with whom Ms. Steacy was living, when he returned to the apartment in the early morning on April 12.

The Canton Police Department requested assistance from the Connecticut Stated Police in investigating the crime. Captain McDonnell, commander of the State Police Detective Division assumed charge of the investigation.

Among the items found at the scene were a bloody palm print on the kitchen counter and a trail of blood, determined to be of type AB, leading from the apartment to an adjacent parking lot.

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[1] Conn. Gen. Stat. §54-82(b) permits a defendant who is accused of a crime punishable by death or imprisonment for life to waive his constitutional right to a trial by jury and to elect a trial by a court composed of three judges.

In the course of the investigation, the police interviewed Mr. and Mrs. Quigley who had visited with the victim on April 8, 1977, the Friday preceding the homicide. While they were present, a man had come to the doorway and invited them to a party in the apartment across the hall. The Quigleys were shown a photograph of Respondent, who was known to be friendly with the occupant of the adjacent apartment, and they identified him as the man who had extended the invitation.

Following their meeting with the Quigleys, the police went to Respondent's apartment on Market Street in Collinsville. No one was at home, and neighbors had complained of the barking of Respondent's dog.

Captain McDonnell issued an order that Respondent was to be found. Trooper Blais questioned Respondent's parents and in-laws and left messages with them for Respondent to call Captain McDonnell at the Litchfield State Police Barracks. Personnel at the barracks were informed that Captain McDonnell wanted to talk with Respondent. From speaking with Respondent's mother-in-law, Trooper Blais ascertained that Respondent and his wife and child had visited his brother-in-law in Plattsburg, New York. On receipt of this information, Captain McDonnell assigned Trooper Blais to a toll booth on the Massachusetts Turnpike in order to watch for Respondent.

On Saturday, April 15, 1977, at 6:05 p.m., Respondent called the Litchfield Barracks from a telephone booth in New Milford, Connecticut, a town close to the New York line and approximately twenty miles from Litchfield. He had just reentered Connecticut and had been informed in a telephone conversation with his mother that Captain McDonnell wished to speak with him.

The call was taken by Trooper McDermott. When Respondent stated he was unfamiliar with the route to the barracks, McDermott

started to give directions which he described as complicated. But, when Respondent suggested that he arrive the next day, McDermott's reply was that he was to come to the barracks that night. McDermott stated he would send a trooper to meet Respondent and lead him to the barracks. According to McDermott, Respondent agreed to this procedure.

Sergeant Cibula was the supervisor at the Litchfield Barracks on the evening of April 16, 1977. Although Cibula was aware that a homicide had occurred in Collinsville, he did not know any specific details. Sergeant Cibula testified that when he was notified of Respondent's call, he was determined that Respondent was going to the New Milford Police Department.[2] Consequently, at Sergeant Cibula's direction, Trooper McDermott arranged for Officer McKay of the New Milford Police to go to the site of the telephone booth and escort Respondent to the New Milford Police Station. When Officer McKay, who had been subpoenaed, was unable to testify at Respondent's trial because of reported dental problems, Petitioner's attorney conceded that Respondent had been "in the custody of an Officer McKay from New Milford" when he was escorted to the New Milford Police Station.[3] Petitioner's attorney referred to McKay as the "transporting authority."[4]

Respondent and his wife and child were then taken from the New Milford Police Station to the Litchfield Barracks in a police car driven by Sergeant Cibula. Respondent's car was left in New Milford.[5] Cibula testified that he did not ask any questions during the forty minute drive, but that Respondent volunteered statements that Captain McDonnell wanted to talk to him about a homicide in Canton,[6] that he suspected the police wished to speak

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[2] T. 379.

[3] T. 348.

[4] T. 390.

[5] T. 489.

[6] Respondent received this information in the telephone conversation with his mother on arriving in Connecticut before he called the Litchfield Barracks. T. 479, 486-87.

with him about his dog, and that recent carpentry work had caused the cuts on his hands.

They arrived at the barracks at 8:10 p.m. Sergeant Cibula introduced Respondent to Captain McDonnell, who was accompanied by Sergeant Cudowrth of the Canton Police Department. McDonnell, Cudworth, and Respondent went upstairs to a room on the second floor. Respondent's wife and child remained on the first floor. McDonnell's notes showed that he and Cudworth started to question Respondent at 8:15 p.m. and that McDonnell did not leave the room until 12:30 on the following morning.

The interrogation was tape-recorded in a room on the first floor, where the interrogation being conducted upstairs could be overheard. Officers were assigned to that room to take notes of the conversations and to keep time checks on various points in the interrogation. Their notes indicated that the interrogation started at approximately 8:15 p.m. and that the recording machine was shut off at 12:15 on the following morning.

The entire recording was played and a transcription of it was read by the trial court when it heard evidence and arguments on Respondent's motion to suppress "potential testimony or other evidence that was obtained in violation of the constitution or laws of the United States or the State of Connecticut."[7] The Supreme Court of Connecticut reviewed the transcription in its disposition of Respondent's case.[8] The entire transcription is appended to this Brief as Exhibit 1, so that this Court may review the facts accurately rather than rely upon the selectively culled portions related by Petitioner.

At the outset of the interrogation, Respondent was told that the police wanted to talk to him about the homicide that had

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[7] Petition at 17A.

[8] Id. at 18A.

occurred in Canton earlier in the week. (T. 446). When the Miranda rights were read and Respondent signed a waiver of those rights, he was informed by Captain McDonnell that he was not under arrest. (T. 447).

During the initial stages of the interrogation, Respondent was asked questions pertaining to the following topics:

(1) His visits to the building in which the victim resided and any acquaintance he might have had with her. (T. 449-60, 473-76).

(2) His departure from the state on the day after the homicide, his reasons for that departure, and his destination. (T. 461, 468-71, 477-81).

(3) His recent employment as a carpenter, which he had given as the cause of the cuts and blisters on his hands. (T. 462-63).

(4) His knowledge of the homicide and the sources of his knowledge. (T. 486-87).

In addition to this questioning, Respondent was told that the police wanted fingerprints and hair samples from all persons who had been in the building. His fingerprints were on file, and he was willing to give samples of his hair. He let his interrogators examine his body and shoes. He agreed to sign a medical release for the police to obtain his blood type and stated his belief that it was AB negative.

Captain McDonnell asked Respondent to consent to a search of his car. At the time, McDonnell apparently believed the car was at the barracks.[9] Respondent was hesitant but agreed to the search after McDonnell said he could watch them and Cudworth assured him that they were not looking for narcotics.

As the interrogation continued, McDonnell sent Cudworth downstairs for consent-to-search and release forms. In Cudworth's absence, Respondent said, "I'd like to talk to my wife if I could." McDonnell's answer was, "Yeah, okay, wait till he comes

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[9] T. 472.

back with the forms." Respondent continued "I'd like to clear a few things up, find out maybe if she knows...which motels and stuff we stayed at." McDonnell answered that the information was unimportant and then said "[b]efore we go if you want to talk to her, try to clean it up."[10]

On Cudworth's return, Respondent again expressed reservations about a search of his car. McDonnell noted he had written "except narcotics or marijuana" on the form.[11]

After the forms were signed, the following conversation occurred:

> [Respondent]: I'd really like to get going as soon as possible, I'm beat.
>
> [Cudworth]: Okay, doing a lot of driving heavy?
>
> [Respondent]: Oh yeah, driving and --
>
> [Cudworth]: Did you do all the driving or did the wife do some?
>
> [Respondent]: Well she did some but I did most of it, I'm, I'm really beat, I'm so damn tired I, I could fall asleep on my feet, get to a motel and just go to sleep.
>
> [McDonnell]: Why don't you go home, sleep in your own house?
>
> [Respondent]: I'm tired of driving.
>
> [McDonnell]: You're home in twenty minutes... twenty-five minutes.
>
> [Respondent]: Oh yeah, but the cars [sic] in Miller's [sic] [New Milford]
>
> [McDonnell]: Oh I thought they brought the car up here.
>
> [Respondent]: No, he, he wanted me to just leave it there I guess.[12]

On learning that the car was in New Milford, McDonnell said "[W]ell, we'll have to go back there somehow and take a look at

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[10] T. 483-84.

[11] T. 488-489.

[12] T. 489.

it, I don't want to do it without you being...around, it doesn't say that here [on the form], but that's how I want do do it...."[13]

The interrogation continued with McDonnell stating that Respondent's leaving on Tuesday, the day after the homicide looked suspicious. More questions were asked about the departure. Respondent was asked to detail his activities on the preceding Monday. He remembered what he had done in the daytime but could recall with certainty only that at night he arrived home very drunk.[14] At this point, Respondent again expressed his desire to terminate the interrogation:

> [S]ee I'm pretty tired, you think I can go, I, I, I'm really, I'd like to terminate this thing cuz ahh any questions I answer, I prob--liable to, start fuckin everything up and telling you I was doing one thing, when I was doing another cuz I'm tired and I don't feel good. [15]

McDonnell's response to Respondent's second request to leave was that being drunk was no crime. He asked if Respondent would mind if they took pictures of his hand.[16] Respondent answered "I don't care."[17] McDonnell said (presumably to Cudworth) "...ask the guys downstairs, some color, color slides, anything...so they can take some photos for us."[18]

Immediately thereafter, Respondent asked once more "[C]an I at least get on the road pretty soon?"[19] McDonnell answered "Hey, we're driving so you won't have to worry about driving, okay?

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[13] T. 489-90.

[14] T. 490-94, 497-99.

[15] T. 499.

[16] Id.

[17] Id.

[18] Id.

[19] Id.

We'll drive you wherever you end up wanting to go."[20]

Respondent, however, persisted in his desire to leave, saying "I want to go back to my car and then from there I'm gonna go, I'll go home, I'll go home, crimidy sakes, cuz I'm so tired. So what do you think?"[21] McDonnell's response was "I think you killed this girl Ricky."[22]

The notes of the officers monitoring the recording contained an entry that Respondent's request to go home followed immediately by Captain McDonnell's accusation occurred at 9:35 p.m.[23]

In the continued interrogation, Respondent expressed his incapability of committing such a heinous act. Captain McDonnell made several comments. He expected to find blood on the seats or steering wheel of Respondent's car. The departure on the next morning looked "pretty suspicious" to a cop. The cut on Respondent's hand appeared to be recent. Blood of the AB type was rare and had been found throughout the victim's apartment.[24]

When Respondent asked for time to think, Sergeant Cudworth asked if he wished to speak to his wife. Respondent answered "[C]an I talk to my wife?" Captain McDonnell responded:

> Yeah, we'll bring up your wife and you can talk to your wife. Now we know you, I'm sure you've confided some of this in your, in your wife, you probably didn't tell her you killed the girl but I'm sure you told her you had to get out of town and you went for this trip.[25]

Respondent's wife was brought upstairs at 9:50 p.m. and conversed privately with him for eight minutes.[26]

When the interrogation resumed, Respondent did not recall the events of April 11-12, 1977. He stated, "I was tripping my fuckin

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[20] Id.

[21] Id.

[22] T. 499-500.

[23] T. 624-25.

[24] T. 502-04.

[25] T. 505

[26] T. 509

brains out."[27]

With Respondent's permission, Captain McDonnell questioned his wife. Beverly Ostroski stated that Respondent left in the morning of April 11 and did not return home until 2:00 a.m. on April 12. He had been drinking and his eyes were dialated like he was "tripping." He was wearing the same clothing and shoes he had on when he left and she did not notice any blood on them or in the car. He did not tell her about anything. He was just "spaced" like he usually was when he got really "bombed." It was his idea to leave on Tuesday morning and they had no particular destination. She returned alone on Wednesday and rejoined him in Vermont on Thursday.[28]

After hearing Beverly Ostroski, Captain McDonnell asked Respondent "[W]hy did you really go out of state Ricky? Think now and tell me the truth."[29] Respondent answered "I was scared... Blood on my hands."[30]

It was only after this, through what he and psychiatrists[31] who testified later in the trial termed "flashbacks," Respondent gave his confession. In a drugged and drunken state he had killed the victim while under the impression that he was combatting imaginary assailants. Thereafter he discarded his clothing and cleaned his car.[32]

Following his confession, Respondent was placed under arrest for murder by Sergeant Cudworth at 11:24 on April 16, 1977.[33]

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[27] Id.

[28] T. 411-514.

[29] T. 514.

[30] T. 515.

[31] Prior to trial, Respondent had filed the notice required by Conn. Practice Book §759 of his intention to introduce expert testimony relating to a condition bearing upon the issue of whether he had the mental state required for the offense charged.

[32] T. 515-20, 529-52, 557-60.

[33] T. 561. Subsequently, Respondent was arrested on a bench warrant issued May 3, 1977, on Sergeant Cudworth's affidavit. Respondent was indicted by a grand jury on June 3, 1977. Printed Record of the Supreme Court of Connecticut 2-7, 8.

The trial court heard arguments on Respondent's motion to suppress in conjunction with Petitioner's offer of Respondent's confession. Respondent argued that the interrogation was custodial within the meaning of Miranda v. Arizona, 384 U.S. 436 (1966), and that his confession should be suppressed because Captain McDonnell and Sergeant Cudworth had refused to honor his requests to cease their questioning, as required by Michigan v. Mosely, 423 U.S. 96 (1975). He also claimed that his confession was involuntary because his will not to incriminate himself had been overcome.[34]

Petitioner contended that Respondent was not in custody when he was interrogated and, therefore, the requirements of the Miranda were inapposite. The voluntariness of the confession was claimed to have been established by a fair preponderance of the evidence. See Lego v. Twomey, 404 U.S. 477 (1972); State v. Staples, 175 Conn. 398, 399 A.2d 1269 (1978).[35]

The trial court denied the motion to suppress and admitted the confession. In doing so, it issued a verbal finding. This finding was not however, the "Finding" submitted to this Court in Petitioner's Appendix A. That Appendix is, in fact, nothing more than an evidentiary ruling made during the testimony of Sergeant Cibula preceding the hearing on the motion to suppress.[36] The trial court's actual finding is reported in the first opinion of the Supreme Court of Connecticut, at page 6A n. 2 of Petitioner's Appendix. This finding differs substantially from the version submitted and labeled by petitioner as "Finding." The real verbal finding is reproduced below for the benefit of

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[34]T. 652-63, 680-87.

[35]T. 663-80.

[36]The ruling that Petitioner has designated as the trial court's finding is at T. 382. The hearing on the motion to suppress starts at T. 436. The actual finding is at T. 687-88.

the Court.

> On April 16, 1978, [sic] the Defendant voluntarily came to the Litchfield Barracks with his wife and child, that the Defendant was under apparent custodial interrogation at the time he was given his Miranda right warnings. There is a distinction in the Miranda warnings from the right to obtain counsel and the right to remain silent. And we are dealing with the right to remain silent in this matter here, and to terminate the custodial interrogation. There is some question with respect to the statements made in [the] transcript as to whether or not equivocally or unequivocally the Defendant asked that the interrogation cease. If we find that there is no equivocation, then that would settle the matter there. If we find there is some question on this matter, then we proceed to whether or not there was a waiver of the rights. And as far as the Panel is concerned on it, we do find there was no violation of the Miranda rights involved herein. And in accordance with State v. Staples, [175 Conn. 398, 399 A.2d 1269 (1978)] we make a finding that the confession is voluntarily, knowingly, and intelligently made, and may be admitted into evidence.[37]

Later in the trial, Petitioner was allowed to place in evidence items to which Respondent objected as being the fruits of an illegal confession. The first item was a print of Respondent's palm that was taken after his arrest by Sergeant Cudworth for the purpose of comparing it with the palm print found on the kitchen counter in the victim's apartment.[38] When asked by the court if there was an independent basis for the admissibility of the palm print (and subsequent items), Petitioner's attorney said:

> I don't think there can be any question, because one of the arguments posed was the fact that when I argued against your finding as to custody was this: that there was no probable cause at that time, and I think it is true that probable cause for the arrest was based on the confession, and if the confession fell, everything fell.[39]
> ....

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[37]T. 687-88.

[38]T. 707-710.

[39]T. 711-12.

> I am certainly willing to admit, as I have stated before, that if the confession falls, all that resulted from the confession, whether you call it the poisonous tree doctrine or what, falls.[40]

III. THE FIRST APPEAL

While Respondent's first appeal was pending, this Court decided Dunaway v. New York, 442 U.S. 200 (1979). Relying upon Dunaway, Respondent claimed that the admission of his confession had violated his Fourth Amendment rights.[41]

At oral argument, Petitioner conceded that when Respondent was brought to the Litchfield Barracks there was no probable cause to arrest or detain him.[42] In its opinion, the Supreme Court of Connecticut stated "[b]ecause the state has conceded that there was no probable cause to arrest or detain, we need not consider what would constitute probable cause in this case."[43]

Petitioner, however, did contend that Respondent was not in custody during his interrogation. On this claim, the Supreme Court of Connecticut opined that the language of the trial court's finding was ambiguous and possibly "an hypothesis assumed in order to reach the fifth amendment issue of the protection of [Respondent's] right to remain silent."[44] The case was remanded for a further articulation on the issue of custody with a direction to consider "the fourth amendment right to be 'secure in their persons...against unreasonable searches and seizures.'"[45]

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[40] T. 715.

[41] The Fourth Amendment claim was allowed by the Supreme Court of Connecticut pursuant to its "exceptional circumstances" doctrine. Petition at 8A.

[42] Petition at 8A.

[43] Id. at n. 3.

[44] Id. at 7A.

[45] Id. at 9A.

IV. THE REMAND

On remand, the trial court found that:

> [I]n the present case, there is no indication that the questioning took place in a context where [Respondent's] freedom to depart was restricted in any way. [Respondent] came voluntarily to the police station barracks, where he was immediately informed that he was not under arrest. He was given and repeated his Miranda rights. In the presence of his wife, he made his confession. At most it could be deemed a coercive environment not converted to a custodial situation.[46]

From these findings, the trial court concluded that Respondent was not taken into custody until after his post-confession arrest by Sergeant Cudworth.

V. THE SECOND APPEAL

The Supreme Court of Connecticut held that the determination of the trial court that Respondent was not in custody prior to his formal arrest was clearly erroneous. On the facts of the instant case, the Supreme Court of Connecticut concluded that Respondent was "seized" when he was taken to the Litchfield Barracks and that the trial court erred in admitting the confession and the physical evidence obtained as a result of the interrogation.[47] The court specifically noted that Petitioner had not argued that, in this case, there was any intervening act sufficient to purge the evidence of the taint of the illegal detention.[48]

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[46]Petition at 13A.

[47]Id. at 15A, 19A, 22A.

[48]Id. at 19A, n. 2

REASONS FOR DENYING THE PETITION

1. THE SUPREME COURT OF CONNECTICUT CORRECTLY CONCLUDED THAT RESPONDENT HAD BEEN SEIZED AND HELD IN CUSTODY IN VIOLATION OF THE FOURTH AMENDMENT

Because of Petitioner's concessions, the Supreme Court of Connecticut was presented with only the narrow question of whether Respondent had been seized and held in custody. As discussed in the Statement Of The Case, supra at 12-13, Petitioner conceded that it had no probable cause[49] to arrest or detain Respondent until after he had actually confessed. Petitioner further failed to argue that there was any intervening act sufficient to purge the confession or other evidence of the taint of the detention. See p. 13, supra.

There is no dispute concerning the substantive law that applies to this case. Aside from certain well-recognized exceptions of brief duration,[50] the Fourth Amendment's requirement that seizures must be supported by probable cause applies equally to formal arrests and investigatory detentions. Dunaway v. New York, 442 U.S. 200, 214-15 (1979); See Davis v. Mississippi, 394 U.S. 721, 726-27 (1969). A "seizure" occurs whenever a police officer accosts an individual and restrains his freedom to walk away. Terry v. Ohio, 392 U.S. 1, 16 (1968). "[A] person has been 'seized' within the meaning of the Fourth Amendment only if,

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49 Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.

Brinegar v. United States, 338 U.S. 160, 175-76 (1949), quoting Carroll v. United States, 267 U.S. 132, 162 (1925).

50 E.g. United States v. Brignoni-Ponce, 422 U.S. 873 (1975) (roving border patrols allowed to stop vehicles and ask limited questions on reasonable suspicion that illegal aliens are being transported); Terry v. Ohio, 392 U.S. 1 (1968) (limited search - i.e. a pat-down for weapons allowed on reasonable suspicion that person being investigated is armed).

in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." United States v. Mendenhall, 446 U.S. 544, 554 (1980) (opinion announcing the judgment). See Reid v. Georgia, 448 U.S. 438, 442-43 (1980) (Powell, J., concurring).

It is on the application of the substantive law to the facts of this case that the parties disagree. Whether a seizure has occurred has been described as "a fact-bound question with a totality-of-circumstances assessment." United States v. Mendenhall, supra, 446 U.S. at 569. (White, J., dissenting). The same approach has been applied to the related Fourth Amendment problem of determining the voluntariness of consents to searches. Schneckcloth v. Bustamonte, 412 U.S. 218, 227 (1973).

Petitioner contends that a seizure did not occur in the instant case because the delivery of Respondent to the Litchfield Barracks and the ensuing interrogation resulted from Respondent's telephone call to the police. Likening this case to Oregon v. Mathiason, 429 U.S. 492 (1977), Petitioner has argued that Respondent's transportation to the barracks and his presence there during the interrogation were his own consensual acts.

In Mathiason, supra, this Court held that the particular circumstances of an interview at a police office did not rise to the level of custodial interrogation and thus did not require an advisement of Miranda rights prior to questioning. A comparison between the factual situations in Mathiason and the instant case, however, demonstrates that the differences between them far outweigh any similarities.

The respondent in Mathiason had telephoned a police officer in response to a message that the officer wished to discuss something with him. The time and place of the subsequent meeting were left to the respondent's choosing. When the respondent ex-

pressed no preference, the meeting was scheduled for the state patrol office at 5:00 p.m., one and one-half hours after the call. This respondent went to the meeting by himself. In a taped conversation, the respondent was informed that he was not under arrest but that the police believed that he had been involved in a burglary. Id. at 493.

Within five minutes after the interview started, the respondent in Mathiason had admitted taking certain property. Thereafter, the respondent was advised of his Miranda rights, and the officer took his taped confession. At the end of the interview, the officer told the respondent that he was not arresting him but was referring the case to the district attorney who would determine whether charges would be brought. The entire interview in Mathiason lasted thirty minutes, and the respondent departed at 5:30 p.m. Id. at 493-94.

In contrast, when the Respondent in the instant case, made his telephone call, he was told to report to the Litchfield Barracks that night. Most significantly on the question of seizure, the police, in this case, took direct action to insure that Respondent would comply with this command. Petitioner has described the transportation of Respondent from New Milford to Litchfield in Sergeant Cibula's police car as "a matter only of mutual convenience." Petition at 16. The evidence, however, is plainly otherwise.

Sergeant Cibula, the supervisor at the barracks testified that when he was informed of Respondent's call, he was determined that Respondent was going to the New Milford Police Department. See p. 4, supra. The only possible inference from Cibula's testimony is that he wanted Respondent in safekeeping, and he was not going to risk Respondent's leaving before the police arrived. Cibula's unambiguous intention to detain is relevant to this case

because it was conveyed to Respondent by the arrival of Officer McKay, who escorted him to the New Milford Police station to await the arrival of the state police. See United States v. Mendenhall, supra, 446 U.S. at 554, n. 6.

At the trial, Petitioner's attorney described McKay as a "transporting authority" and Respondent as having been in the "custody" of McKay.[51] See p. 4, supra. Obviously, Cibula -- who gave the order and who subsequently drove Respondent to Litchfield himself -- acted in the same capacity. This series of events plainly satisfied the objective test for a "seizure" enunciated in Mendenhall. A reasonable person who had been told to report to a distant police barracks that night would not have believed he was free to leave the policeman who had been sent to take him there. See United States v. Jones, 630 F.2d 613, 616 (8th Cir. 1980). This is, in short, a case involving an order to "pick up" Respondent and "bring him in." See Dunaway v. New York, supra, 442 U.S. at 203.[52]

Petitioner argues that the question of seizure must be confined to Respondent's encounter with Sergeant Cibula. Petition at 17-19. But, even if Respondent's dealings with Cibula were

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[51]Petitioner's attorney described Officer McKay as a "custodian" and a "transporting authority" in spite of the fact that Respondent drove his car to the New Milford Police Station while being escorted by McKay. In these circumstances, it made little difference whether Respondent rode to the Litchfield Barracks in Cibula's car -- which he did -- or drove his own car under escort. The "mutual convenience" referred to in p. 16 of the Petition was obviously of no real importance. Respondent was in custody no matter what the mode of travel.

[52]Petitioner suggests that Cibula's action in driving to New Milford was unauthorized. Petition at 4-5. At the trial, however, Petitioner's attorney, on his direct examination of Cibula, established that Cibula was the night shift supervisor at the Litchfield Barracks on April 16, 1977, and that the desk officer (McDermott) who made the arrangements with the New Milford police was under Cibula's command. T. 377-78.

assumed to be consensual, the further question of the legality of his subsequent detention and interrogation would remain. See Dunaway v. New York, supra, 442 U.S. at 212-13; United States v. Brignoni-Ponce, 422 U.S. 873, 881-82 (1975).

Contrary to Petitioner's assertions, the Supreme Court of Connecticut did not misinterpret the issue before it. That issue was the admissibility of Respondent's confession and other evidence that were alleged to have been obtained in violation of the Fourth Amendment. The Supreme Court of Connecticut concluded that the trial court erred in admitting the incriminating evidence because Respondent had been illegally seized and held in custody. Petition at 19A, 21A-23A. Before reaching its conclusions, the Supreme Court of Connecticut was constitutionally required to consider all of the underlying circumstances. See Taylor v. Alabama, 50 U.S. L.W. 4783 (U.S. June 23, 1982) (No. 81-5162). Dunaway v. New York, supra, Brown v. Illinois, 422 U.S. 590 (1975). Indeed, Petitioner appears to appreciate the fallacy of its claim by attempting to revive the previously conceded issue of lack of probable cause. Petition at 19.

A "seizure" may be occasioned by a show of police authority as well as by use of physical force. United States v. Mendenhall, supra, 446 U.S. at 553. The authority exhibited in this case is demonstrated vividly by comparing the circumstances of Respondent's interrogation with the encounter at issue in Oregon v. Mathiason, supra.

The suspect in Mathiason never requested that his thirty minute session with the police officer be terminated. In contrast, the Respondent in the instant case, made three requests to leave between 8:15 p.m., when the interrogation commenced, and 9:35 p.m. Each request was deflected by questions or statements from Captain McDonnell that would indicate to a reasonable person that the

requests had been rebuffed. See pp. 7-9, supra. The interrogation continued for several hours thereafter. The extent of the detention is a factor to be considered in determining its lawfulness. United States v. Anderson, 663 F.2d 934, 941 (9th Cir. 1981). The suspect in Mathiason was free to depart even after he had confessed. The Respondent in the instant case was never informed that he was free to go. The comments of the police during his interrogation made it clear that they intended to continue his detention. Respondent was even told that he was to present at a search of his car in which the police said they expected to find incriminating evidence. See pp. 7-9, supra.

The conclusions of the Supreme Court of Connecticut, in this case, parallel the decisions of this Court in Taylor v. Alabama, supra, Dunaway v. New York, supra, and Brown v. Illinois, supra. Respondent was taken into custody without probable cause and interrogated in the hope that something would turn up. Petitioner has never claimed that the confession and other evidence obtained was separated from the "seizure" by an intervening event. Under these circumstances, there is no reason for this Court to review this issue.

II. PETITIONER'S CLAIM THAT RESPONDENT WAS SEIZED UPON PROBABLE CAUSE WAS EXPRESSLY ABANDONED IN THE STATE COURTS AND HAS NOT BEEN PRESERVED FOR REVIEW BY THIS COURT

As discussed supra, Petitioner conceded in the Supreme Court of Connecticut that at the time of Respondent's arrival at the police barracks there was no probable cause to arrest or detain him. Petition at 8A. In a desperate attempt to escape the consequences of this concession, Petitioner has now contended in its Petition that, "if an informal seizure occurred at all in this case, it occurred at a point in time at which the police had probable cause to believe the respondent committed the killing."

Id. at 19. The specific contention appears to be that probable cause developed during the course of Respondent's interrogation but before Respondent had actually confessed.

This claim was, however, expressly abandoned by Petitioner in the trial court. During the suppression hearing, Petitioner's attorney explicitly conceded that "probable cause for the arrest was based on the confession, and if the confession fell, everything fell." (T. 712). A few minutes later, this concession was reiterated. "I am certainly willing to admit, as I stated before, that if the confession falls, everything falls, all that resulted from the confession, whether you call it the poisonous tree doctrine or what, falls." (T. 715). As a result of this concession, neither the trial court nor the Supreme Court of Connecticut have had an opportunity to pass on this claim, which Petitioner has now raised in this Court for the first time. Consequently, as the Court has repeatedly explained, there is no federal jurisdiction to consider this question.

> It was very early established that the Court will not decide federal constitutional issues raised here for the first time on review of state court decisions. In Crowell v. Randell, 10 Pet. 368 (1836), Justice Story reviewed the earlier cases commencing with Owings v. Norwood's Lessee, 5 Cranch 344 (1809), and came to the conclusion that the Judiciary Act of 1789, c. 20, §25, 1 Stat. 85, vested this Court with no jurisdiction unless a federal question was raised and decided in the state court below. "If both of these do not appear on the record, the appellate jurisdiction fails." 10 Pet. 368, 391. The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions both before the Crowell opinion, Miller v. Nicholls, 4 Wheat, 311, 315 (1819), and since....

Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). This jurisdictional rule is required by 28 U.S.C. §1257(3) (1976)[53] and is

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[53]This statutory jurisdictional requirement distinguishes the certiorari review of state court judgments from that of lower federal court judgments. Compare, e.g., United States v. Mendenhall 446 U.S. 544, 551-52, n. 5 (1980), with Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). See Sup. Ct. R. 21.1(h).

supported by powerful policy considerations and reasons of practicality alike. Webb v. Webb, 451 U.S. 493, 499-501 (1981). Since the federal question presented has never been raised, preserved, or passed upon in the State courts below, it should not and cannot now be considered here.

III. THE ERRONEOUS ADMISSION OF RESPONDENT'S CONFESSION WAS NOT HARMLESS BEYOND A REASONABLE DOUBT

Faced with the admission of his illegally obtained confession over his objection, Respondent took the stand in support of a defense that he lacked the requisite intent to commit murder or, in the alternative, that he "acted under the influence of extreme emotional disturbance." See Conn. Gen. Stat. §53a-54a(a). In the course of his testimony, he admitted a confused memory of stabbing Kim Steacy. (T. 867-68). Petitioner consequently claims that "these facts rendered any error in the admission of the challenged evidence harmless beyond a reasonable doubt." Petition at 20. This mistaken contention is irreconcilable with the governing principles established by this Court.

The controlling case -- conveniently ignored by petitioner -- is Harrison v. United States, 392 U.S. 219 (1968). Harrison, like the instant case, involved a criminal defendant who, faced with the admission of an illegally obtained confession over his objection," took the witness stand and testified to his own version of the events leading to the victim's death." Id. at 220. His conviction was reversed on appeal and, on remand, the prosecution read to the jury the defendant's testimony at the prior trial The resulting conviction was reversed by this Court, holding that "the same principle that prohibits the use of confessions [wrongfully] procured also prohibits the use of any testimony impelled thereby." Id. at 222. The Court's reasoning is squarely applicable to the instant case.

> In concluding that the petitioner's prior testimony could be used against him without regard to the confessions that had been introduced in evidence before he testified, the Court of Appeals relied on the fact that the petitioner had "made a conscious tactical decision to seek acquittal by taking the stand after [his] in-custody statements had been let in...." But that observation is beside the point. The question is not whether the petitioner made a knowing decision to testify, but why. If he did so in order to overcome the impact of confessions illegally obtained and hence improperly introduced, then his testimony was tainted by the same illegality that rendered the confessions themselves inadmissible.

Id. at 223.

The Court, moreover, squarely placed the burden of proving that the wrongfully obtained confession did not induce the defendant's trial testimony squarely on the shoulders of the prosecution.

> [H]aving illegally placed his confessions before the jury, the Government can hardly demand a demonstration by the petitioner that he would not have testified as he did if his inadmissible confessions had not been used. "The springs of conduct are subtle and varied," Mr. Justice Cardozo once observed. "One who meddles with them must not insist upon too nice a measure of proof that the spring which he released was effective to the exclusion of all others." Having "released the spring" by using the petitioner's unlawfully obtained confessions against him, the Government must show that its illegal action did not induce his testimony.

Id. at 224-25 (quoting DeCicco v. Schweizer, 221 N.Y. 431, 438, 117 N.E. 807, 810 (1917).

Petitioner does not even venture to suggest such a showing in the instant case, and indeed none can be made. Respondent, like Eddie Harrison, took the stand only after his confession had been admitted in evidence. Had that confession not been introduced, he might well have not testified at all. And, even if he would have testified anyway, he would not necessarily have admitted being at the scene of the crime and stabbing the victim.

"On the contrary, the more natural inference is that no testimonial admission so damaging would have been made if the prosecutor had not already spread [his confession] before the jury." Id. at 225-26. This is an inference that Petitioner has not dispelled. Under these circumstances, it can hardly be said that the admission of Respondent's unlawfully obtained confession was "harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 24 (1967).[54]

IV. A GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE SHOULD NOT BE ADOPTED AND APPLIED TO THIS CASE

Petitioner's final contention is that this Court should adopt a "good faith" exception to the exclusionary rule and apply such an exception in this case. This invitation should be rejected for three independent reasons.

(a) Petitioner acknowledges that this claim, like its second contention discussed supra, was never raised, preserved, or passed upon in the state courts below. Petition at 26, n. 17. As this Court explained in Cardinale v. Louisiana and Webb v. Webb, supra, Petitioner's failure to initially present its claim to the state courts necessarily results in a lack of federal jurisdiction to review that claim. Petitioner's rationalization that it was not obligated to raise its claim below because the state courts were "incompetent to rule definitively upon it" is unsupported by an authority and cannot be reconciled with the explicit requirements of 28 U.S.C. §1257 and the powerful policy considerations enunciated in Cardinale and Webb. Petitioner's argument, if adopted,

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[54]This case is obviously distinguishable from Milton v. Wainwright, 407 U.S. 731 (1972); Schneble v. Florida, 405 U.S. 427 (1972); and Harrington v. California, 395 U.S. 250 (1969), which held the evidentiary errors at issue in those cases to be harmless beyond a reasonable doubt by virtue of concededly admissible inculpatory statements made by the defendants. The statements by the defendants in those cases that vitiated the errors at issue were pretrial statements. Milton, Schneble, and Harrington did not purport to consider the cause-and-effect relationship between a confession spread before the jury and the subsequent testimony of the accused at issue in Harrison and the instant case.

would relieve any litigant of raising any federal claim in any lower court, since this Court is necessarily the ultimate source of "definitive" rulings.

(b) Petitioner's substantive argument that a "good faith" exception to the exclusionary rule should be adopted by this Court has now been succinctly answered by this Court in Taylor v. Alabama, 50 U.S.L.W. 4783 (U.S. June 23, 1982) (No. 81-5152), in response to a similar contention by Alabama. "To date, we have not recognized such an exception, and we decline to do so here." Id. at 4785.

(c) The theoretical merits of a "good faith" exception to the exclusionary rule aside, the instant case is a plainly inappropriate one for the enunciation and application of such an exception. The subjective good faith of the police officers who interrogated Respondent was not a subject of inquiry in the trial court, and the existence of such a benevolent mentality is by no means as "apparent from the record" as Petitioner asserts. The central fact of this case is that Respondent repeatedly asked to leave and that his interrogation cease and that the police repeatedly deflected or ignored his requests. This is not a case of well-mentioned law enforcement officers unintentionally running afoul of an abstruse rule of law. This is a case of law enforcement officers, bent on obtaining a confession from a person they had seized without probable cause, who aggressively and ceaselessly employed every possible stratagem to cajole, entice, and extract that confession after their prisoner had made it crystal clear that he wanted the interrogation to cease. No "good faith" exception should countenance such official behavior.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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JON C. BLUE
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(203) 789-7477
Counsel for Respondent

July 15, 1982

NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition, together with a copy of its Appendix, was deposited in a United States post office, with first-class postage prepaid, addressed to Austin J. McGuigan, Esq., Chief State's Attorney, P.O. Box 5000, Wallingford, Connecticut 06492, this 15th day of July, 1982. I further certify that all parties required to be served have been served.

Jerrold H. Barnett

JERROLD H. BARNETT
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
Counsel for Respondent

NO. 81-2285

SUPREME COURT OF THE UNITED STATES

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STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

STATEMENT CONCERNING MAILING

I, Jerrold H. Barnett, having been first duly sworn, hereby make affidavit and say as follows:

1. I am an attorney for the Respondent in the above-entitled action and a member of the bar of this Court. I am making this Statement pursuant to S.Ct. Rule 28.2.

2. To my knowledge, copies of the Respondent's Brief in Opposition, its Appendix, and a Motion for Leave to Proceed in Forma Pauperis were deposited in a United States post office, with first-class postage prepaid, and properly addressed to the Clerk of this Court, on July 15, 1982, within the permitted time for such filing.

Jerrold H Barnett

JERROLD H. BARNETT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss NEW HAVEN

Personally appeared before me Jerrold H. Barnett, signer of the foregoing Statement, who, being first duly sworn, declared it to be his free act and deed this 15th day of July, 1982.

JON C. BLUE
Commissioner of the Superior Court

RECEIVED
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OFFICE OF THE CLERK
SUPREME COURT, U.S.

NO. 81-2285

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

STATE OF CONNECTICUT,
Petitioner,

v.

RICHARD OSTROSKI,
Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF CONNECTICUT

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Pursuant to Rule 46.1 of the Rules of this Court, the Respondent in the above-entitled case hereby moves, through his attorney, that he be allowed to proceed in forma pauperis. Because Respondent is confined in the Connecticut Correctional Institution, Somers, it has not been possible for his attorney to obtain a current financial affidavit from him. A copy of the affidavit that Respondent executed for his appeal in the lower courts and an affidavit of his attorney are attached hereto. Respondent's motion to proceed in forma pauperis in his lower court appeal was granted on May 4, 1979.

PETITIONER
RICHARD OSTROSKI

BY: Jerrold H. Barnett

JERROLD H. BARNETT
Chief Public Defender's Office
121 Elm Street
New Haven, Connecticut 06510
(203) 789-7477
His Attorney

STATE OF CONNECTICUT
APPLICATION FOR WAIVER OF FEES, COSTS AND EXPENSES AND APPOINTMENT OF COUNSEL ON APPEAL FROM JUDGMENT OF CONVICTION

DOCKET NO. 41843

STATE OF CONNECTICUT
vs.
Richard Ostroski
(Name of defendant)

SUPERIOR COURT
COUNTY OF Hartford J.D. Judicial Dis

October 19, 1978
(Date of Judgment)

1. I am indigent and cannot pay the costs and expenses of an appeal, nor can I afford to obtain an attorney.

2. The grounds upon which I propose to appeal are:

1. It is against the law.

2. It is against the evidence.

3. The court committed error in admitting a confession, and various other evidence and testimony against the defendant.

3011 3011
3014 3014

WHEREFORE, I request that the court (1) waive the payment by me of the fees specified in Sec. 602 of the Connecticut Practice Book, taxable costs, and the requirement of Sec. 612 concerning the furnishing of security for costs upon appeal, (2) appoint counsel to prosecute my appeal without expense to me and (3) order that the necessary expenses of prosecuting the appeal be paid by the state, pursuant to Section 603 of the Connecticut Practice Book.

3015
3016
3017

Richard Ostroski
(Signature of defendant)

Subscribed and sworn to before me this 21st day of November, 19 78

Title: Commissioner of Superior Court

UNLESS THE COURT EXTENDS THE TIME LIMIT, THIS APPLICATION MUST BE SIGNED AND FILED WITHIN TWENTY (20) DAYS FROM THE DATE OF JUDGMENT WITH:

CLERK, SUPERIOR COURT, COUNTY OF .....

JD-CR 44-B 8-78

AFFIDAVIT

I, Jerrold H. Barnett, having been first duly sworn, hereby make affidavit and say as follows:

1. I am the Chief of Legal Services for the Chief Public Defender's Office in Connecticut and have represented Richard Ostroski in the appeal of his conviction.

2. Mr. Ostroski is currently confined in the Connecticut Correctional Institution, Somers, serving a life sentence.

3. To the best of my knowledge and belief, Mr. Ostroski has no income or assets whatsoever and because of his poverty is unable to pay the costs of proceeding in the Supreme Court of the United States or to give security therefore.

Jerrold H. Barnett
JERROLD H. BARNETT

STATE OF CONNECTICUT }
COUNTY OF NEW HAVEN } ss NEW HAVEN

Personally appeared before me, Jerrold H. Barnett, signer of the foregoing Affidavit, who, being first duly sworn, declared it to be his free act and deed this 15th day of July, 1982.

Jon C. Blue
JON C. BLUE
Commissioner of the Superior Court

Office - Supreme Court, U.S.
FILED
SEP 21 1982
ALEXANDER L. STEVAS,
CLERK

NO. 81-2285

In The
Supreme Court Of The United States

OCTOBER TERM, 1981

STATE OF CONNECTICUT
Petitioner

v.

RICHARD OSTROSKI
Respondent

PETITIONER'S REPLY BRIEF

AUSTIN J. McGUIGAN
Chief State's Attorney

JOHN M. MASSAMENO
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PETITIONER'S ARGUMENT IN REPLY

1. The petitioner never conceded that probable cause to arrest the respondent arose only after the respondent confessed to the murder.

The respondent seeks to persuade this Court that the petitioner conceded below that probable cause to arrest the respondent arose only by reason of his confession. Respondent's Brief in Opposition at 21. The record simply does not support that claim. Not only does the opinion of the Supreme Court of Connecticut carefully describe the state's stipulation otherwise,[1] the transcript of the trial discloses that the state expressly refused to enter into any such stipulation.[2]

Moreover, since the respondent objected to the admission of the confession at trial on Fifth Amendment grounds and raised the Fourth Amendment issue for the first time on appeal (prior to the first remand); Pet. App. C, 6A-7A; the trial court would not have been concerned

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1 The Supreme Court of Connecticut clearly set out the state's concession when it said: "[T]he state has conceded that there was no probable cause to seize the [respondent] *at the time he was taken to the Litchfield barracks*...." Pet. App. E, 19A (emphasis added).

2 When the respondent's attorney asked the attorney for the state to stipulate that the respondent was arrested as a result only of the confession he gave, the state's attorney stated: "Gentlemen, I would be ready to stipulate to the fact that the arrest took place at the Litchfield Barracks, as is noted in the testimony of Captain McDonnell, and then the [respondent] was removed for processing to the Canton Police Department on that date." Tr. 711. The respondent's lawyer, persisting, later suggested: "Perhaps we could stipulate to that then, that up to the point, say he confessed, there was not probable cause to arrest him." Tr. 712. To that offer, the state's attorney replied: "Well, I think that is a different stipulation"; Tr. 712; and refused to stipulate to any facts relating to probable cause. Tr. 712-13.

during the trial with when probable cause to support a seizure would have arisen. Probable cause was not then an issue. When, after the remand, the trial court did address the Fourth Amendment seizure issue, it concluded that, only after the respondent was formally arrested, after he had confessed, was he seized. Pet. App. D, 13A. It did not, therefore, have to inquire of the existence of probable cause at an earlier point in time.

2. The petitioner never conceded that the respondent was in custody before being taken to the Litchfield barracks.

The respondent attempts to suggest that the petitioner actually conceded that the respondent was in custody when he followed the New Milford police officer in his car to the New Milford Police Station. Respondent's Brief in Opposition at 18. He does so by cleverly extracting terms from the transcript out of context and disguising their true import.

Of course, the petitioner made no such concession. More important, the respondent never even claimed either in the trial court or before the Connecticut Supreme Court that he was in custody or was seized before he entered the state trooper's cruiser at New Milford and was brought to the Litchfield barracks. Instead, he consistently argued that he was seized once he entered that cruiser.[3]

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[3] At the trial, the respondent's attorney objected on Fifth Amendment grounds to evidence of statements made by the respondent in the state trooper's cruiser and said: "I submit, Your Honors, that once he is put in that police cruiser on his way to the Barracks, that he was in custody. . . ." Pet. App. A, 1A.

In his Supreme Court brief, the respondent said: "[W]hile [the respondent] may have voluntarily called the Litchfield Police Station

3. This Court has jurisdiction to review the petitioner's claim that, if the respondent was seized at all prior to his formal arrest, he was seized at a point in time at which probable cause existed.

As noted above, the petitioner never conceded that probable cause to believe the respondent committed murder arose only after his confession. Nor were the state courts deprived of an opportunity to ascertain whether and, if so when, the respondent was seized informally under the Fourth Amendment prior to his formal arrest. Indeed, that determination was required of the trial court by the Supreme Court in its remand. Pet. App. C, 8A-9A. The respondent cannot dispute, and the record amply demonstrates, that whether an informal seizure occurred in this case, and, if so when it did, became the central question before the state courts. In fact, it became so at the respondent's behest. That the trial court found that no informal seizure occurred prior to formal arrest; Pet. App. C, 13A; and the supreme court concluded that an informal seizure occurred when the respondent was "taken" to the Litchfield barracks; Pet. App. E, 19A; does not change that fact. Either court, after reviewing all of the facts in evidence, could have concluded that an informal seizure occurred prior to arrest but at a time at which the state had probable cause to believe the respondent committed murder.

To say that, because on appeal the petitioner adhered to its view that the respondent was not "seized" before his formal arrest, the state courts were not given an opportunity to pass upon the question of an earlier

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3 continued

[sic] and driven, although escorted, to the New Milford barracks [sic], his transportation to the Litchfield barracks amounted to a 'seizure' and the restriction constituted custody." Resp.'s Sup. Ct. Br. at 73. *See also* Pet. App. C, 7A (respondent's Fourth Amendment claim set out).

seizure supported by probable cause, stretches the jurisdictional requirements of 28 U.S.C. §1257(3) (1966) too far. It is sufficient for jurisdictional purposes if a federal question is raised and decided in the state court below. *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Wood v. Georgia*, 450 U.S. 261, 264-65 (1981) (due process violation "apparent on the particular facts of a case"); *see also Braniff Airways v. Nebraska State Board*, 347 U.S. 590, 598-99 (1954) (due process claim considered where within the clear intendment of the contention in state court); R. Stern & E. Gressman, Supreme Court Practice, p. 118 (4th Ed. 1969). The Fourth Amendment issue of seizure, with or without probable cause, was unquestionably raised and decided below.

4. The respondent was not "impelled" to ratify his confession at trial by the prior admission of his confession.

The respondent claims that no error in the admission of his confession could be deemed harmless beyond a reasonable doubt by reason of his later ratification of that confession at trial. He bases this claim on the assertion that he was "impelled" to ratify his confession to overcome its prejudicial impact. *See Harrison v. United States*, 392 U.S. 219, 222-24 (1968).

The respondent's claim is fatally flawed for several reasons. Unlike *Harrison*, the respondent's attorney never asserted that his client would not testify at trial. *Cf. id.*, at 225. Instead, the respondent notified the state prior to trial that he would rely upon a defense predicated upon his absence of the mental state required for the crime. *See* Conn. Gen. Stat. §§53a-7, 53a-54a; Conn. Prac. Bk. §759. He, thus, intended to admit the act but deny the requisite mental state. *See* W. LaFave & A. Scott, Jr., Criminal Law §42 (1972). There is,

therefore, no indication that the respondent altered his trial strategy in light of the confession's admission into evidence, and the respondent has not even attempted to so argue. Respondent's Brief in Opposition at 23; *cf. Randall v. Estelle*, 492 F2d. 118, 120-21 (5th Cir. 1974) (original strategy abandoned).

The respondent, also unlike *Harrison*, prior to testifying in his defense, was questioned by his own attorney and the court concerning his decision to testify. Pet. App. B, 2A-3A. That that decision was made voluntarily and knowingly and without any condition or reservation is evident from the transcript of that inquiry. *Ibid.* And while the respondent's attorney identified evidence throughout the trial that he believed to be the "fruit of the poisonous tree" (the allegedly "tainted confession") he did not so designate his client's decision to testify or to ratify his confession. *Ibid.*

Finally, the respondent's decision to testify and personally assert a state of mind defense that included ratification of his confession made ample sense under the circumstances. The state, after all, had all of the non-confession evidence of guilt that would have remained untainted. That evidence included the respondent's palm print in blood on the counter top in the victim's apartment. The state also had matched the rare blood type found at the scene of the crime (in addition to that of the victim's) with that of the respondent's.[4] The state can readily meet its burden of proving that the respondent's decision to ratify his confession was not "impelled" by the admission into evidence of that confession but was, instead, part of a

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[4] It is beyond peradventure that the state was entitled to take a specimen of the respondent's blood and to obtain a palm print from him without his consent. *United States v. Wade*, 388 U.S. 218, 222-23 (1976) (finger-printing); *Schmerber v. California*, 384 U.S. 757, 765 (1966) (blood sample).

carefully devised and long-planned defense strategy. *Cf. Harrison v. United States, supra*, 225-26.

5. This Court may consider the adoption and application of a good-faith exception to the Exclusionary Rule in this case.

The state's failure to assert a good-faith exception to the exclusionary rule in the state courts should not preclude this Court's consideration of it. It is plain that the federal question involved in this case, i.e. unreasonable seizure under the Fourth Amendment, was raised and decided below in compliance with this Court's jurisdictional mandate. *See Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969). The remedy to be applied for a violation of the Fourth Amendment is not a separate federal question that requires special presentation below.

Moreover, none of the policy reasons for allowing the state courts to first consider the state's argument is applicable here. The record is sufficiently developed to permit consideration of the exception.[5] There is no possibility of a resolution of the claim on state grounds. *Cf. Cardinale v. Louisiana, supra*, 439 (these considerations there significant). And state courts would unquestionably be unlikely to adopt a new rule that would require them to depart from clear constitutional holdings of this Court that are binding upon them. Thus, the objective of judicial economy or that of comity would be little served by prior state court review.

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[5] Even if the record weren't adequate, however, this Court could remand the case to the state courts for development of the record in the interests of justice. *Wood v. Georgia*, 450 U.S. 261, 265 n.5 (1981); 28 U.S.C. §2106 (1966); R. Stern & E. Gressman, Supreme Court Practice §6.27, at 460.

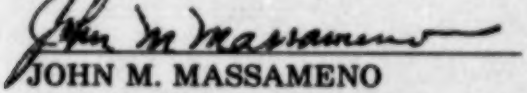
Finally, the good-faith exception proposed by the state raises a recurring issue of enormous importance to the administration of criminal justice in this country. *Cf. Carlson v. Green*, 446 U.S. 14, 16 n.2 (1980) (that factor militates toward consideration of issue first presented in petition for certiorari on review of federal circuit court judgment). The time has come to consider a good-faith exception to the exclusionary rule. No case could better demonstrate the wisdom of such an exception than this one.

CONCLUSION

For the reasons stated above, the State of Connecticut urges this Court to grant the petition for a writ of certiorari to the Connecticut Supreme Court or, in the alternative, vacate and reverse the judgment of that court.

Respectfully submitted.

AUSTIN J. McGUIGAN
Chief State's Attorney



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